No. 91-1009

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. _____

RICHARD NEAL SCHOWENGERDT, PETITIONER

v.

THE UNITED STATES OF AMERICA, ET. AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD NEAL SCHOWENGERDT
P.O. Box 3284
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In Propria Persona

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not petitioner had a reasonable expectation of privacy in his desk and credenza which was given over to him for his exclusive use;

2. Whether or not General Dynamics and government respondents had the right to intrude into petitioner's private sexual activites without a search warrant;

3. Whether or not General Dynamics and government respondents had the right to seize personal materials in petitioner's desk which involved private sexual matters;

4. Whether or not above mentioned respondents had the right to seize various other personal materials in petitioner's desk which were unrelated to his sexual activities, such as his checkbook, gems, framed family photographs, professional associate namecards, and Japanese-American dictionaries;

5. Whether or not petitioner's discharge from the Naval Reserve for alleged statements indicating a bisexual orientation was justified; and

6. Whether or not Petitioner is entitled to damages as a result of above actions by Respondents.

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases Page

TABLE OF AUTHORITIES (CONTINUED)

Page

Statutes

U.S. Constitutional Amendments

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. _____

RICHARD NEAL SCHOWENGERDT, PETITIONER

v.

THE UNITED STATES OF AMERICA, ET. AL.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard Neal Schowengerdt, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on 6 September 1991.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported as Schowengerdt v. U.S. 944 F.2d 483 (9th Cir. 1991) and appears as Appendix A herein. The opinions, judgments, and other supporting documents of the District Court, Appendix B herein, are not reported.

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1. The other parties in this case are respondents Department of the Navy; John Lehman, Secretary of the Navy; General Dynamics Corporation; C.W. Kessel; K.D. Tillotson; Carl W. Jensen; and Richard S. Day.

JURISDICTION

The opinion and judgment of the court of appeals, Appendix A herein, was entered on 6 September 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and this appeal is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution in relevant part:

Congress shall make no law * * * abridging the freedom of speech * * *

2. The Fourth Amendment to the United States Constitution in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *

3. The Fifth Amendment to the United States Constitution in relevant part:

No person shall be * * * a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. The jurisdiction of the District Court was predicated on Title 28 U.S.C. Sections 1331(a), 1343(4), 1361, 2201, and the Federal Torts Claim Act.

5. The jurisdiction of the Court of Appeals was based on Title 28 U.S.C. Section 1291.

6. The review of administrative action of the Department of the Navy and the Secretary of the Navy was brought under the Federal Administrative Procedure Act, Title 5, U.S.C. Sections 701-706, and the Federal Declaratory Judgment Act , Title 28, U.S.C. Section 2201.

STATEMENT

1. Petitioner, Richard Neal Schowengerdt, in propria persona, filed a Complaint For Personal Injuries And Invasion Of Privacy against numerous respondents on 9 December 1983, alleging deprivations of his right of privacy as a result of various personal items being removed from his desk and credenza in his office space located at the Naval Industrial Reserve Ordnance Plant, Pomona, California, on or about 9-10 August 1982 while he was a civil service employee of the Department of the Navy. Petitioner cited the Fourth Amendment and the Federal Torts Claim Act in redressing grievances, alleging abuses of official authority, unlawful search, seizure, confiscation, disclosure of personal materials, distortion of facts, obstruction of justice, and malicious intent to damage petitioner's civil service and military career. Petitioner prayed for a total of five million dollars in damages against General Dynamics Corporation and various other officials. Pursuant to written stipulation between the parties concerned, petitioner, on 30 April 1984 filed a First Amended Complaint on 30 April 1984. This amendedment clarified the various causes of action with respect to parties concerned, alleged additional U.S. Code and constitutional violations, added pendant jurisdictional claims for invasion of privacy and trespass, prayed for declaratory and injunctive relief, and eliminated the Federal Tort Claims Act provisions. In accordance with an agreement with the U.S. Attorney, petitioner removed the Secretary of

Defense as a defendant and reduced the lawsuit to $4,000,000 upon granting of his Secret clearance by the Department of Defense on 26 April 1984. Respondents filed motions to dismiss on 4 June 1984 and petitioner filed his response on 22 June 1984. A perfunctory and pro forma hearing thereon was held on 2 July 1984 wherein the District Court granted respondents' motions to dismiss upon the allegations that: (1) petitioner did not have a reasonable expectation of privacy in his government office; (2) he had not exhausted his administrative appeals; and (3) he had not stated a cause for conspiracy in his complaint.

2. Petitioner filed a Notice of Appeal on 7 August 1984 and a hearing was held on 6 February 1986. On 30 July 1987 the Ninth Circuit opinion was filed wherein the judgment of the District Court dismissing petitioner's complaint was reversed in part, affirmed in part, and remanded for further proceedings in the lower court. In its opinion, the court held, interalia, that: (1) the District Court had erred in concluding that petitioner could not prove an unreasonable search because he was a government employee or because his desk and credenza were the property of the government; (2) petitioner may have cause for a Bivens action as special factors counselling hesitation appeared to be absent; and (3) it appeared that petitioner had exhausted his administrative remedies concerning the military discharge and that this decision was ripe for judicial review by the District Court. See Schowengerdt v. General Dynamics Corp. 823 F.2d 1328 (9th Cir. 1987) or Appendix C herein.[2]

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2. While the Circuit Court stated that petitioner had not sufficiently stated a cause for conspiracy, on remand petitioner strengthened his conspiracy charge. Although he has solid evidence to suggest that he was the target of a conspiracy because of a cost cutting beneficial suggestion he submitted in 1981, he has chosen not to address the conspiracy charge in this pleading for purposes of narrowing the scope of the Supreme Court review to essential Constitutional issues. Petitioner reserves the right to readdress the conspiracy issue at a later date in the lower courts should that opportunity arise.

3. Petitioner revised his complaint several times after 1987 in response to discussions with respondents and as a result of lower court actions. In 1988 the District Court reinstated the Federal Tort Claims Act which had earlier been removed and ultimately became Count I, Tort Claims Against The United States of America, of the currently effective Fourth Amended Complaint dated 25 February 1988, Appendix D herein. Count I alleged wrongful acts on the part of General Dynamics and government officials acting under color of federal authority which deprived petitioner of various constitutional rights, impugned his reputation, disrupted his familial harmony, jeopardized his security clearance and employment opportunities, terminated his Naval Reserve career, causing him severe and prolonged mental anguish, anxiety, and emotional distress, and pled for damages in the sum of $1,000,000. Count II, Civil Rights Claims Against General Dynamics Corporation and all Individual Defendants, arose under the First, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution and alleged that respondents' acts were done with malice and conspirational intent to oppress and harass petitioner, and pled for exemplary and punitive damages in the sum of $1,000,000. Count III, Review of Administrative Action against the Department of the Navy and the Secretary of the Navy, was brought under the Federal Administrative Procedure Act, Title 5, USC Sections 701-706, and the Federal Declaratory Judgment Act, Title 28, USC Section 2201; Count III alleged violations of petitioner's rights under the First, Fourth, Fifth, and Ninth Amendments to the Constitution and also alleged that his discharge was contrary to Naval regulations, was unsupported by substantial evidence, was arbitrary, capricious, and constituted an abuse of discretion; Count III further alleged that petitioner suffered irreparable injury as a consequence of his separation from the Naval Reserve including loss of seniority, pay, active

duty, and retirement benefits, and pled for a Declaratory Judgment and Injunction directed to the Department of the Navy and the Secretary of the Navy to reinstate petitioner to his former position in the Naval Reserve, together with all rights and and benefits to which he was entitled. Count IV, Pendant Jurisdiction Claim for Invasion of Privacy Against General Dynamics Corporation and C.W. Kessel, realleged various claims in Count I and Count II and pled general damages of $1,000,000 and punitive damages of $1,000,000. Count V, Pendant Jurisdiction Claim for Trespass Against Defendant General Dynamics Corporation and C.W. Kessel, realleged various claims in Count I and Count II and pled for general damages of $1,000,000 and punitive damages of $1,000,000.

4. Between December 1988 and December 1989, several decrees were granted by the District Court in favor of respondents and separately appealed by petitioner. Although two judgments granting qualified immunity for all individual Bivens respondents were never properly certified by the District Court, petitioner was allowed to address these issues in his final appeal of 8 January 1990 wherein he moved for consolidation of Appeal No. 89-55191 dealing with the Naval Reserve discharge with Appeal No. 89-55733 dealing with the Federal Tort Claims.

5. On 8 March 1991 oral arguments were heard by the Circuit Court and in its decision and opinion filed on 6 September 1991 the court held that petitioner's: (1) fourth amendment rights were not violated in light of the extreme security measures in place at the facility; (2) expectation of privacy was not reasonable; (3) discharge from the Naval Reserve was affirmed; and (4) other complaints were meritless (See Appendix A). This position signals a significant departure from the majority of case law concerning privacy in the workplace as well as the Circuit Court's own 1987 opinion which will be addressed in the next section.

REASONS FOR GRANTING THE PETITION

1. Significance of Lower Court Ruling. This case presents important constitutional questions concerning privacy in the workplace and has widespread significance, not only for individuals in the government and military-industrial complex, but in all private industries and businesses as well. The decision of the Circuit Court in affirming the District Court's ruling is at variance with several major rulings in other circuit courts as well as in the Supreme Court. This decision was seriously flawed as well because of a false assumption that linked the warrantless search to a genuine government security issue; such a link simply did not exist. The Circuit Court wrongly assumed in agreeing with the District Court's decision that petitioner's activities in some way could constitute a security risk and therefore justified government intrusion and the warrantless search. There are substantive factual issues still at dispute as well as erroneous interpretations of contractor and government regulations in force at the Pomona facility in August 1982. Not only are these interpretations incorrect, this ruling sets a dangerous precedent. Are all defense employee's personal lives to come under constant surveillance and investigation? Should the office of every employee who engages in an extramarital affair be raided and his personal belongings confiscated on the outside chance that he is a security risk? This is precisely the position that respondents and the courts below have taken. If this decision is not overturned by this Court widespread warrantless searches will undoubtedly result, not only throughout the military industrial complex but throughout the entire workplace. Nondefense industrial security personnel as well could be utilized by their management to intrude into the private sexual lives of individuals considered by

management to be a "threat" to their power structure or simply to remove unwanted or unpopular individuals. The defense industry by no means holds a monopoly over the so-called "operational reality of the workplace" theory; any industry or organizational entity can claim high security needs whether it be intellectual property, access to computer facilities, financial assets, ad infinitum. They can assert, on their authority alone without any basis of fact or employee agreement, that the "operational realities" invalidate any legitimate expectation of privacy in an employee's work space or desk. Regardless of the fact that there would be absolutely no work-related subject matter involved, there would be literally no end to warrantless searches, seizure of personal property, and invasion of privacy done in the name of "security."

2. Factual Disputes Still At Issue. The lower court has overlooked General Dynamics' own regulations which stated unequivically that personal materials were not subject to search and should not be commented upon by security guards unless such materials fell into the class of prohibited materials which were listed in the regulation, such as guns, knives, explosives, etc., or were government or contractor equipment or materials, Appendix E herein. Petitioner's personal materials did not fall into this class but were personal and private correspondence dealing with petitioner's sexual activities with individuals outside the workplace. None of these activities had any security nexus as determined by petitioner's own personnel office, Appendix G herein; that is, none of the activities involved foreign nationals or individuals who had any interest whatsoever with petitioner's government work. Respondents and the courts below have erroneously concluded that petitioner agreed to and was aware that searches of this type would routinely be conducted. Such a theory imposes upon petitioner an employment contract which simply never existed.

3. Previously Held Standards for Fourth Amendment Violations In The Workplace. The leading case dealing with this specific question is U.S. v. Nassar 476 F.2d 1111; the court therein stated that a government office is not a public area, and that a trespass can be committed against the occupant employee by an over-zealous employer. The court specifically held that the element of work-relatedness defines where the line must be drawn between a proper employer search of an employee's desk and a trespass. Also, in U.S. v. Blok 188 F.2d 1019, it was held that a government employer could not, under the Fourth Amendment, reasonably search an employee's desk for anything not connected with the work of the office, but could only be made for property needed for official use. The court also held that the employer could not, without a warrant, search for evidence of crimes unrelated to the employee's work. Williams v. Collins 728 F.2d 721, also draws the trespass line at work-relatedness. The analogy of the above cases to the instant matter is apparent when one considers that the instant search was originally made for allegedly "pornographic" material and not for security purposes as shown by Page 1 of Appendix F herein. First, was the material actually "pornographic" by contemporary standards? Petitioner contends that it was private correspondence and no more "pornographic" than copies of Playboy Magazine sold at military exchanges. Second, if the material was deemed to be actually pornographic, contrary to the assertion of the courts below, there is no rule, instruction, regulation, or law forbidding an employee, even one with a security clearance, from keeping allegedly pornographic material in his desk drawer. Respondents herein have never identified any such rule or law that was violated. The District Court stated emphatically in 1984, without reference to any authority, that keeping alleged pornography was a violation of certain rules, regulations, or laws, and that the employer had

an absolute right to search an employee's desk for suspected pornography. After reversal and remand by the Circuit Court, further proceedings in the District Court resulted in respondents posturing their defense upon "security" issues rather than "pornography" and the court's latest ruling which was merely a rehash of the 1984 ruling with unjustified security hyperbole thrown in. For example, both Federal and Private respondents cite O'Connor v. Ortega 480 U.S. 709, 107 S.Ct. 1492, in arguing that petitioner's fourth amendment rights did not apply because of the "operational realities" of the work place and because petitioner was suspected of work-related misconduct. A detailed examination of O'Connor actually supports petitioner's position in the majority ruling..."However, a majority of the Court agrees with the determination of the Court of Appeals that respondent had a reasonable expectation of privacy in his office. Regardless of any expectation of privacy in the office itself, the undisputed evidence supports the conclusion that respondent had a reasonable expectation of privacy at least in his desk and file cabinets..." O'Connor at 710. A most relevant ruling of five Supreme Court justices found that "[c]onstitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." O'Connor at 107 S.Ct. 1505. The essential difference between petitioner's case and that of O'Connor is that his "operational reality" consisted of a classified document environment versus that of a medical doctor with private files on his patients. There is absolutely no more stringent "operational reality" in the instant case than in O'Connor. Here the focus is on work-related classified documents and their security rather than sensitive medical records on patients, neither of which justify seizure of personal correspondence having no relationship to petitioner's work. While

the government obviously had the right to search for such classified documents or other work-related materials, they certainly had no right to search for or seize personal belongings left in the desk, credenza, or file cabinets. Petitioner never signed any agreement nor was he ever made aware of any possibility that his personal belongings in his office or car would be subject to search and/or confiscation unless they were in the aforementioned class of prohibited materials. Both Ortega and petitioner should have enjoyed privacy of personal materials. In Thorne v. El Segundo 802 F.2d 1131,1139 the Ninth Circuit held..."the Constitution prohibits unregulated, unrestrained employer inquiries into personal sexual matters that have no bearing on job performance." Petitioner contends that his excellent civilian employment and exemplary Naval Reserve record should have proven that the District Court erred in ruling that such sexual inquiries were job-related and that he could not have had a reasonable expectation of privacy. The court below also misinterpreted petitioner's testimony in stating that "...He should have known that...the inscription on the manila envelope would serve only to trigger the curiousity of an investigator, or any fellow employee, trained to be alert to possibilities of blackmail..." (See Appendix A at Page 12463, lines 4-7. There are frequently envelopes in employee's desk which are marked "personal and private" which contain sensitive personnel information. Employees were never instructed to open such envelopes. They were trained to look only for material marked Confidential, Secret, etc.; or if we were looking for particular work-related documents, we would limit our search to such materials. If such envelopes were inadvertently opened we always respected the privacy of the individual and put it back where it was found. Petitioner contends that the subject investigator, respondent KESSEL, should have recognized the intimately private nature of the material in the

manila envelope and left it alone. If he truly had serious thoughts about the potentiality for "blackmail" or believed that the material was inappropriate for storage at the Pomona facility, petitioner contends that KESSEL should have discussed the subject with him and made a recommendation to that effect rather than seizing the material which did not belong to General Dynamics or the government. Here again, however, it is essential that it be understood that the original reason given in 1982 for seizure of the material was that it was "pornography" and that the "security" jusitification was used only after 1987 upon remand from the circuit court when it was found that pornography was not a valid reason. The court below has cited United States v. McConney 728 F.2d 1195, 1203 (9th Cir.), cert. denied, 469 U.S. 824 (1984) as partial justification for their decision (See Appendix A Page 12461, Lines 11-13; petitioner has examined this case and sees little resemblance between it and the instant case. McConney was a criminal case involving a warrantless entry, search, and seizure wherein there was reasonable cause to suspect that defendants may arm themselves or destroy evidence. Petitioner, by contrast, was not involved in any illegal activity and was not even present at the time of seizure of materials, therefore he could not have destroyed any so-called "evidence." If respondents felt that petitioner had materials that should not be stored in the facility they could have easily confronted him with the materials and obviated any possibility of such destruction of "evidence." Respondents also seized other personal materials such as framed family photographs, dictionaries, gems, etc., none of which had any relationship to the so-called suspected "misconduct." It should be obvious that respondents' position concerning "suspected work-related misconduct" was simply an excuse without any factual basis whatsoever and that the search and seizure was clearly outside the scope of the employment situation.

4. Inter-relationship of Constitutional Violations. The Circuit Court concurred with the District Court that petitioner's first amendment rights were not violated because he was not discharged for writing about bisexuality but rather for being a bisexual, of which his purely private correspondence was evidence. There is a basic fallacy of reasoning in reaching such a decision. First, the only so-called "evidence" in possession of the authorities were writings wherein petitioner stated an interest in bisexual activities, there being no evidence whatsoever that petitioner actually engaged in such activities or ever made contacts for such purposes. No one can reasonably conclude that a person is actually bisexual merely because he indicates in writings that he is interested in such activities. If such is the intention of the services' regulations, then they should be struck down on constitutional grounds. Suppose upon reflection and such an actual encounter, such a person decides that a bisexual lifestyle is not for him. If he is to be terminated from Naval service merely for such written expressions, his first amendment rights of free expression are chilled by such a severe action or anticipation of such action. Second, in seizing his private correspondence and other personal materials in a warrantless search his fourth amendment rights were abridged, and third, in using such "evidence" as witness against himself, his fifth amendment rights were abridged as well since he has indeed been deprived of private property which has been taken for public use without just compensation. As the record shows, petitioner's Naval Reserve service was exemplary and he received several special awards and recognition for outstanding engineering work by his commanders. His distinguished career was unjustly and abruptly terminated by a kangeroo court of three military officers without any opportunity to present evidence that he was not truly a bisexual. In Ben Shalom v. Secretary of the Army 489 F Supp 964 it was

found that the Administrative Board which recommended her discharge disclosed no evidence of homosexual acts with, or advances to, other reserve personnel, or any evidence that the homosexuality had any relevance or effect on her otherwise excellent performance; the same is true at the hearing concerning petitioner who had an excellent military record and had achieved special recognition for contributions in his reserve unit. Additionally, petitioner has denied any bisexuality or homosexuality. The Court in Ben Shalom held that it could properly issue a writ of mandamus to the Secretary of the Army compelling Ben Shalom's reinstatement and that the writ was not barred by sovereign immunity. The Court's ruling in Beller v. Middendorf 632 F.2d 788 is in accord on these specific issues. The Court in Ben Shalom also noted that the Secretary of the Army could not excercise his judgment in an unconstitutional manner citing Matlovich v. Secretary of Air Force 591 F.2d 852 and Harmon v. Brucker 355 U.S. 579 and noted that significant First, Fifth, and Ninth Amendment claims had been raised by petitioners. The focus of Navy policy in both Dronenburg v. Zech 741 F.2d 1388 and Beller was shown to be homosexual acts, and not on states of mind, as was the case of Ben Shalom. Likewise, the Court is again in accord with that posture in Watkins v. U.S. Army 721 F.2d 687 wherein the Court upheld the discharge of an active, admitted homosexual. Similarly, in Hathaway v. Secretary of the Army 641 F.2d 1376, this Court noted the focus of the military on homosexual acts and conduct. In contrast, in Ben Shalom it was held that the Army unjustly discharged a soldier who "evidences homosexual tendencies, desire, or interest, but is without overt acts." It was specifically the lack of such acts which led the Court in Ben Shalom to issue the prayed-for writ against the reservist's discharge. The instant case is analagous to Ben Shalom as there is no evidence of overt acts on the part of petitioner; furthermore

respondents admit that there are no overt acts, merely that the Military Board chose to "believe" that petitioner was bisexual. As there was no "substantial evidence" as respondents allege, their action in discharging petitioner was based upon "belief" and accordingly, their action was arbitrary and capricious. Violation of petitioner's first and fifth amendment rights due to respondents' actions are in effect a censure of petitioner's rights to freedom of speech and a restriction of his rights to life, liberty, and the pursuit of happiness, a compulsion to be a involuntary witness against himself, and an indictment of petitioner's behavior by an arbitrary military court procedure. At the time of his discharge petitioner had only six years of service remaining to attain retirement privileges and resultant financial rewards for his long service; respondents' actions have terminated petitioner's military career and seriously impaired his ability to obtain appropriate security clearances in civilian positions. These actions by respondents have resulted in a continuing serious deprivation of a fulfilling career, loss of promotional opportunities on the Advanced Tactical Fighter and B-2 programs, and prolonged despair and mental anguish.

5. Respondents Should Not Have Qualified Immunity. Respondents would have the Court believe that their security mission gives them a mandate to do whatever they desire with impunity. They can apply any kind of criteria they wish, however farfetched and fanciful, to justify their invasion of privacy by hiding behind the security smokescreen. Petitioner's possession of a Japanese-English dictionary, cheap mail order gems, check stubs for a few dollars, and sexually oriented letters to prospective partners are linked by imaginative hyperbole and a giant leap of misguided faith to a dream world scenario...an employee likely to be consorting with Japanese agents through the itermediary of a bevy of female blackmailers being paid

off with $15 Black Stars of India. In reality, however, Respondent General Dynamics' Guard Force Policies And Procedures Manual, referenced on Page 3, Paragraph 4, of Appendix E herein clearly establishes the limits of searches in the Pomona facility which does not include personal materials. Respondent KESSEL'S decision to seize petitioner's manila envelope and its contents was a clear violation of the company's policy as outlined in this manual in addition to Constitutional violations of petitioner's right to privacy. Respondent KESSEL'S decision also was based upon false assumptions that petitioner could be subject to blackmail...such an assumption was subjective and not based upon objective facts. Petitioner was known to have had extramarital affairs and his spouse knew of such affairs. The fact that petitioner had a distinctive marking on a particular envelope with regard to its personal and private nature and the desired disposition after his death does not provide respondents with justification for determining that petitioner could be subject to blackmail. Since respondent KESSEL'S recollection of the incident under deposition in 1988 conflicts with the original 1982 NIS report (See Page 1 of Appendix F herein), there is a clear indication that respondents are attempting to establish a stronger security justification for the search and seizure than actually existed. Appendix G referenced on Page 12 herein establishes that no disciplinary action was taken inasmuch as Appellant had not violated any government regulations. Appendix H illustrates Appellant's excellent Naval Reserve and civilian employment record maintained during this period. The aforementioned excerpts clearly demonstrate that there was no "nexus" between petitioner's activities and his work or security clearance and that petitioner exhibited an above average performance level.

CONCLUSION

The lower court's ruling in this case is at variance with the majority of case law pertaining to privacy in the workplace. Because of the very real potential of setting a dangerous precedent for warrantless searches and seizures throughout the entire workplace, it is essential that the lower court's ruling be reviewed in the interest of protection of individual privacy under the Fourth Amendment. A review of this case will reveal that petitioner's involvement in extramarital affairs had no potential whatsoever for compromise of security information inasmuch as his spouse knew of similar affairs and his envelope with distinctive markings relative to its disposition after his death was only done to protect his wife from further grief. There are also substantial factual disputes still at issue concerning regulations in place at the Pomona facility for which petitioner was on notice. In addition, petitioner's rights of free expression under the First Amendment were clearly chilled by the effect of his correspondence concerning his interest in bisexuality which resulted in his discharge from the Naval Reserve. Likewise, his rights under the Fifth Amendment were abridged as his written expressions were used as "evidence" against him in the military court. The entire matter was most unjust in view of his exemplary employment record, both as a civilian employee and naval reservist. Therefore, it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals in this matter.

Dated: 27 November 1991

Richard N. Schowengerdt

In Propria Persona

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 91-1809

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. _____

RICHARD NEAL SCHOWENGERDT, PETITIONER

v.

THE UNITED STATES OF AMERICA, ET. AL.

APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX TO APPENDICES

149 pp

APPENDIX A Opinion of the Ninth Circuit
Court of Appeals filed 6 September 1991

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD NEAL SCHOWENGERDT,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; JOHN F. LEHMAN, JR., Sec. of the Navy; GENERAL DYNAMICS CORPORATION; C.W. KESSEL; K.D. TILLOTSON; CARL W. JENSEN; RICHARD S. DAY,
Defendants-Appellees.

No. 89-55733
D.C. No.
CV-83-8007-AAH

RICHARD NEAL SCHOWENGERDT,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; JOHN F. LEHMAN, JR., Sec. of the Navy,
Defendants-Appellees.

No. 90-55191
D.C. No.
CV-83-8007-AAH
OPINION

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding

Argued and Submitted
March 8, 1991—Pasadena, California

Filed September 6, 1991

Before: William C. Canby, Jr. and Pamela Ann Rymer, Circuit Judges, and James Ware,* District Jduge.

Opinion by Judge Canby

SUMMARY

Constitutional Law

Affirming a district court grant of summary judgment, the court of appeals held that a Navy civilian engineer with a "secret" security classification had no reasonable expectation of privacy in his office, desk or credenza requiring a search warrant before personal items were seized.

Appellant Richard Neal Schowengerdt was employed by the Navy as a civilian engineer to work on secret weapons-related projects, for which he had a "secret" security classification. Extensive security precautions are taken at the facility, including the search of employees' offices and office furniture. Employees knew of the security procedures and concerns. Acting on a tip, an investigator searched Schowengerdt's office without his consent or a search warrant. Documents were found in an envelope in his credenza indicating involvement in bisexual and heterosexual activities. More items were seized during a second search. Schowengerdt's supervisor concluded that, on the basis of the items seized, Schowengerdt fit the profile of a person susceptible to blackmail by hostile intelligence agents. Information reflecting adversely on Schowengerdt's security status was made known when he obtained employment with a private military contractor. Subsequently, Schowengerdt was discharge from the Navy pursuant to its regulations requiring

*The Honorable James Ware, United States District Judge for the Northern District of California, sitting by designation.

discharge of homosexuals, including bisexuals. Schowengerdt filed suit against the Navy under Section 1983, alleging violations of his civil rights. The district court granted summary judgment in favor of the Navy, concluding that no warrant was required for the searches.

[1] The court agreed that the operational realities of Schowengerdt's work place precluded his having an objectively reasonable expectation of privacy in his office, desk or credenza. [2] Whether locked or not, Schowengerdt's office was searched daily, in his absence, by guards specifically looking for security violations. The primary focus of those searches was on the proper storage of classified documents, for which employees also checked each other. [3] In this peculiarly unprivate work environment, Schowengerdt had no reasonable expectation of privacy in his desk and credenza, locked or unlocked. [4] Schowengerdt was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes. On that ground, the court affirmed the grant of summary judgment.

[5] Schowengerdt's claims stemming from his discharge from the Naval Reserve were also meritless. The first amendment was not violated because he was not discharged for writing about bisexuality but rather for being a bisexual, of which his purely private correspondence was evidence. Neither did his discharge violate due process because he was afforded abundant opportunity to object to his discharge and to have his objections heard by an administrative board. [6] Schowengerdt's substantive due process argument, based on a right of privacy, was also meritless. [7] Schowengerdt's argument that his discharge was arbitrary and capricious because he was never proven to be a bisexual was also meritless. The discharge board made an express adverse credibility finding in that regard, and found him to be a bisexual. That determination was supported by substantial evidence.

COUNSEL

Richard Neal Schowengerdt, Pro Se, Lakewood, California, for the plaintiff-appellant.

Donna R. Eide, Assistant United States Attorney; Nancy P. McClelland, Gibson, Dunn & Crutcher, Los Angeles, California, for the defendants-appellees.

OPINION

CANBY, Circuit Judge:

Richard Schowengerdt appeals from summary judgments dismissing his civil rights claims brought under 42 U.S.C. § 1983. Schowengerdt's claims arise out of the search of his office, where he worked for the Navy as a civilian military engineer on classified projects, and out of his subsequent discharge from the Naval Reserve. We affirm.

I. Background

A. Underlying facts[1]

At the time of the events giving rise to this action, Schowengerdt was employed by the Navy as a civilian engineer to work on secret weapons-related projects, for which he had a "secret" security classification. Schowengerdt was also a Chief Warrant Officer in the Naval Reserve, assigned to a missile test center.

The Naval Industrial Ordinance Plant in Pomona, California, where Schowengerdt worked, houses a wide variety of projects of secret and top-secret military weapons design, manufacture and testing. The plant is owned by the Navy, but operated by General Dynamics Corporation, which provides security services for the plant. Extensive security precautions are taken at the facility. Those precautions include frequent scheduled and random searches of work spaces by security guards. General Dynamics also employs investigators to pursue more detailed investigations into possible instances of compromised security which come to their attention. To facilitate searches, security agents have access to keys to all offices and office furniture.

Schowengerdt was well aware of these security procedures, having been employed at this facility for thirteen years. He had personally observed his office being searched on numerous occasions to ascertain his compliance with procedures relating to the proper storage of classified documents. Also, all employees, including Schowengerdt, were required to attend periodic security briefings, at which they were informed of all security procedures. In those briefings, they were made aware that the Navy's security concerns extended beyond physical protection of classified documents, and included concerns that employees not divulge classified information to inappropriate sources. That concern encompassed a variety of conditions which might compromise an employee's ability to maintain security, including those which might make an employee susceptible to blackmail.

On August 9, 1982, Charles Kessel, who was a security investigator for General Dynamics, searched Schowengerdt's office, without his consent or a search warrant, after Schowengerdt had left work for the day. That search was precipitated by an anonymous tip, stating that Schowengerdt's office contained material "of interest to the security department." Kessel's search was confined to the credenza in Schowengerdt's office, which is where the informant said that the material would be found. The parties dispute whether the

[1] The relevant facts have been related in this court's earlier ruling in this action, *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987) ("*Schowengerdt I*"). For convenience, we repeat them here.

doors to Schowengerdt's office and to the credenza were locked.

In the credenza, Kessel found and seized a manila envelope marked with the following notations on the outside: "Strictly Personal and Private. In the event of my death, please destroy this material as I do not want my grieving widow to read it." The envelope contained correspondence and photographs indicating Schowengerdt's involvement in heterosexual and bisexual activities. The correspondence indicated that Schowengerdt solicited sexual encounters through want ads in "swingers" magazines and clubs.

During work hours the next day, when Schowengerdt was momentarily absent, his office was again searched without his consent or a warrant. This search was conducted by Kessel and Carl Jensen, special agent for the Naval Investigative Service, and K.D. Tillotson, the Navy Commanding Officer at the facility. At this search, the agents seized numerous personal items. This second search was authorized by Jensen's supervisor, who agreed with Jensen that no warrant was required because the supervisor believed that government employees did not have a legitimate expectation of privacy in their work spaces.

On the basis of the correspondence contained in the manila envelope, and the envelope's external inscription, Jensen concluded that Schowengerdt fit the profile of a person susceptible to blackmail by hostile intelligence agents.[2] Jensen then

[2]The searches revealed the following evidence suggesting the possibility of compromised security: the inscription, quoted above, on the outside of the manila envelope suggested that Schowengerdt had something to hide; several of Schowengerdt's letters soliciting sexual liaisons made reference to the fact that he worked for the Navy as a missile engineer, and included his office telephone number and his Navy engineer business card; he included photographs of himself in his Navy uniform, as well as nude; and one letter from an Italian stewardess indicated that she was seeking sexual relationships primarily with servicemen.

began an investigation to determine whether Schowengerdt constituted a security risk. He interviewed Schowengerdt, who admitted to being a bisexual.[3] Jensen also obtained Schowengerdt's permission to search his home.

As a result of this investigation, Jensen concluded that there was no evidence that plaintiff had been contacted by a hostile agent or that he was the target of blackmail. Jensen wrote a report of his investigation and transmitted that report to various federal offices responsible for maintenance of security, as well as to Schowengerdt's Commanding Officer in the Naval Reserve.

No action was taken against Schowengerdt by his employer, other than an oral admonishment that he had exercised poor judgment in storing the material in his office. His security clearance and duties remained unchanged. Shortly after this incident, Schowengerdt resigned from his civilian position with the Navy, and obtained employment with a private military contractor. In the process of transferring Schowengerdt's security clearance from government employment to private employment, the agency responsible for establishing and monitoring security clearances inquired of the Navy whether there was any evidence in Schowengerdt's file potentially reflecting adversely on his security status. In response, the Navy (through defendant Day) provided the report of Jensen's investigation. Schowengerdt was ultimately granted the security clearance he sought, but only after a delay of 13 months, caused, in part, by an inquiry into the nature of the earlier investigation.

Upon receiving Jensen's security investigation report, the Naval Reserve commenced discharge proceedings, pursuant to its regulations requiring discharge of homosexuals, includ-

[3]Schowengerdt denied making this admission, but the Navy Discharge Board ruled against him, making an adverse credibility finding. The district court accepted the Board's finding.

ing bisexuals. The bases for those proceedings were Schowengerdt's purported statement that he was a bisexual, and his descriptions of his bisexual activities in his seized correspondence. The board of officers convened to hear the case found Schowengerdt's correspondence to constitute an admission that he was a bisexual. Schowengerdt contested the charge, maintaining that he was not a bisexual. He denied describing himself to Jensen as a bisexual, and asserted that his correspondence describing bisexual activity was mere fantasy-writing. The board found Schowengerdt's testimony to be not credible and recommended that he be discharged under honorable conditions. He was subsequently so discharged.

B. Procedural History

Schowengerdt filed this action against the United States, the Department of the Navy, and their employees involved in the search and ensuing investigation. He also sued General Dynamics and its employee Kessel. He charged that the search of his office and credenza and the disclosure of his sexual activities that resulted from the subsequent investigation violated his rights to privacy, freedom of association and speech, and to freedom from unreasonable searches and seizures, as protected by the first, fourth, fifth, sixth and ninth amendments, as well as various federal statutes. He also charged a conspiracy to violate those rights, and asserted pendent state law privacy and trespass claims. He also challenged his discharge from the Naval Reserve as violating Navy regulations as well as rights protected by the first, fourth, fifth and ninth amendments.

The district court initially dismissed all of Schowengerdt's claims under Fed. R. Civ. P. 12(b)(6). As to those arising out of the search, the district court held that Schowengerdt had failed to allege facts sufficient to establish a reasonable expectation of privacy in his office, desk or credenza, primarily because he was a government employee. The district court

dismissed Schowengerdt's claims based on his discharge from the service because he had not yet exhausted his administrative remedies in that regard. Schowengerdt appealed those rulings to this court.

In *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987) ("*Schowengerdt I*"), we affirmed the dismissal of Schowengerdt's various statutory claims and state law claims. We remanded the claims arising out of Schowengerdt's discharge from the Naval Reserve, because government counsel acknowledged at oral argument that Schowengerdt had, by then, exhausted his administrative remedies. We reversed the district court's fourth amendment ruling, holding that the district court had erred in concluding that Schowengerdt could not prove an unreasonable search because he was a government employee, and because his desk and credenza were the property of the government. We held that

> Schowengerdt would enjoy a reasonable expectation of privacy in areas given over to his exclusive use, unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes.

Schowengerdt I, 823 F.2d at 1335 (footnote omitted).

We remanded for factual findings "relevant to the existence and scope of policies and practices or regulations relating to searches at the Naval facility." *Id.* Finally, we stated that:

> [I]f it is found that Schowengerdt had a reasonable expectation of privacy, under *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987), a warrantless search of his office nevertheless could be legal if the search was both work-related — that is, carried out to retrieve the employer's property or to investigate work-

related misconduct — and 'reasonable' under the circumstances.

Id.

On remand, the district court granted summary judgment dismissing all of Schowengerdt's claims. The district court rejected Schowengerdt's fourth amendment claim, finding that, because of the extensive security procedures in place at the facility, he had no reasonable expectation of privacy in his office, desk or credenza. Thus, the district court concluded that no warrant was required for these searches.[4]

The district court also granted summary judgment in favor of the Navy on Schowengerdt's constitutional claims challenging his discharge on the ground of his bisexuality. The district court held that the first amendment was not violated because Schowengerdt's correspondence was not a matter of public concern, nor was he discharged for exercising his speech; the fourth amendment was not violated because Schowengerdt's discharge was not a consequence of an illegal search; the fifth amendment's procedural protections were not violated because he was accorded an ample pre-termination hearing; and Schowengerdt's substantive due process or equal protection claims did not survive the deferential review accorded to the Navy's action in discharging him. This appeal followed.

II. Discussion

Schowengerdt argues that the district court committed numerous errors. We disagree. We have reviewed all of

[4]Because we affirm the district court's ruling that Schowengerdt had no expectation of privacy in the areas searched, we do not address the district court's alternative rulings that the search was a reasonable, work-related search, and that the defendants conducting the search were entitled to qualified immunity.

Schowengerdt's arguments and find them meritless. We will discuss here only those arguments regarding the legality of the search of his office, his conspiracy claim, and his claims arising out of his discharge from the Naval Reserve.

A. Fourth Amendment

[1] On remand from *Schowengerdt I*, the district court was presented with extensive uncontroverted evidence relevant to Schowengerdt's expectation of privacy. The district court concluded that "the operational realities" of Schowengerdt's work place precluded his having an objectively reasonable expectation of privacy in his office, desk or credenza. After de novo review of that conclusion, *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984), we agree. Schowengerdt may have had a subjective expectation of privacy in his credenza, or the manila envelope in it, but that expectation was not objectively reasonable.

All employees at this facility were well aware of its extremely tight security procedures. Upon entering and leaving the building, and in the innermost recesses of their offices, employees were constantly being searched and surveilled for compliance with security precautions in a manner that would be considered unduly invasive in a more conventional work place.

[2] Whether locked or not, Schowengerdt's office was searched daily, in his absence, by guards specifically looking for security violations. The primary focus of those searches was on the proper storage of classified documents, for which employees also checked each other. Schowengerdt himself testified that, when it was his turn to search his fellow employees' offices, he would pull on drawers to see whether they were locked and, if they were not, he "might be inclined to look inside and see if there were any documents lying loose, classified documents."

[3] There is conflicting evidence offered as to whether Schowengerdt's credenza was locked at the time of the searches in question. This is not a dispute of material fact, however, as Schowengerdt was well aware that security investigators had access to duplicate keys should they wish to pursue an investigation into his locked desk or credenza. In this peculiarly unprivate work environment, Schowengerdt had no reasonable expectation of privacy in his desk and credenza, locked or unlocked.

Schowengerdt argues that this constant surveillance was confined to enforcing compliance with regulations for securing classified documents, which were clearly marked as such, and that other materials that were clearly personal were not subject to search. Uncontroverted evidence refutes his argument. Schowengerdt and his fellow employees were well aware that the Navy was extremely concerned about the variety of ways by which classified information could be divulged to inappropriate sources, other than through the loss or theft of inadequately secured documents.[8] They were also aware that the facility employed security investigators, as distinct from security guards, whose job it was to investigate possibilities of such breaches of security. In Schowengerdt's words, these investigators were authorized to "look into more things than a guard would look into, . . . [into] details that a guard would not be expected to look into, trying to determine what actually happened in a situation." Schowengerdt knew that these investigators had access to keys to his office, desk and credenza.

[4] Given that peculiar environment, Schowengerdt did not have a reasonable expectation of privacy in his office or in his locked credenza, or in a manila envelope stored in the credenza which indicated on its exterior that it contained information which he wanted kept secret from his wife. He should have known that his credenza, even if locked, was subject to search, and that the inscription on the manila envelope would serve only to trigger the curiosity of an investigator, or any fellow employee, trained to be alert to possibilities of blackmail.[9] In short, Schowengerdt was "on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes." *Schowengerdt I*, 823 F.2d at 1335. On that ground, we affirm the district court's grant of summary judgment dismissing Schowengerdt's fourth amendment claim.

[8] *E.g.*, Schowengerdt testified that the Navy was concerned that employees might be tempted to sell classified information, or might be either induced or blackmailed into divulging information as a result of a romantic or sexual liaison.

B. *Conspiracy*

Schowengerdt has maintained throughout this litigation that the search of his office was the result of a conspiracy on the part of his superiors to retaliate against him for having gone "over their heads" with a cost-saving suggestion that they had earlier rejected. To prevail on this claim Schowengerdt must

[9] Schowengerdt's own statements in his briefs on appeal before this court nearly concede this point:

> Duplicate keys are for necessary work-related matters in the absence of the employee and when a critical need arises to enter his desk or file cabinet. Keys are not intended for the purpose of browsing around to see what you can find out about an employee and they are not intended for intelligence specialists to gain private information about employees without a warrant. *This is not to preclude an investigation when it is warranted, i.e. when an indication that a security compromise has been made* or is being contemplated by an employee *because of some reason which has come to their attention* or there is evidence of theft, etc. (Emphasis added.)

That Kessel's initial search was "warranted" is also conceded:

> While plaintiff agrees that Kessel was compelled to investigate to the extent of an initial examination of the material in the manila envelope, the investigation should have ended there under the rules in force at the Pomona facility.

show that the defendants agreed among themselves to act against him unlawfully, or for an unlawful purpose. *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1343 (9th Cir.), *cert. denied*, 111 S.Ct. 430 (1990). To survive the defendants' motion for summary judgment, Schowengerdt must provide specific evidence establishing those facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Schowengerdt has not done so. He has only repeated the allegations in his complaint, based on inference and speculation. The district court properly granted summary judgment on this claim.

C. *Discharge from the Naval Reserve for Bisexuality*

[5] Schowengerdt's claims stemming from his discharge from the Naval Reserve are also meritless. The first amendment was not violated because he was not discharged for writing about bisexuality but rather for *being* a bisexual, of which his purely private correspondence was evidence.[7] *See Pruitt v. Cheney*, No. 87-5914, slip op. 11295, 11302-05 (9th Cir. Aug. 19, 1991); *Johnson v. Orr*, 617 F.Supp. 170, 178 (E.D.Ca. 1985), *aff'd*, 787 F.2d 597 (9th Cir. 1986). His discharge did not violate procedural due process because he was afforded abundant opportunity to object to his discharge and to have his objections heard by an administrative board, before as well as after termination. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985).

[6] Schowengerdt's substantive due process argument, based on a right of privacy, is also meritless. We have rejected such a challenge to regulations nearly identical to those requiring Schowengerdt's discharge here, and we did so under a higher level of scrutiny than is currently required. *See Beller v. Middendorf*, 632 F.2d 788, 809 (1980), *cert. denied*, 454 U.S. 855 (1981) (holding the Naval policy of mandatory discharge of homosexuals does not violate substantive due process, under a level of scrutiny "somewhere between" the two standards of "rational basis" and "strict" scrutiny.) *See also High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (stating that *Bowers v. Hardwick*, 478 U.S. 186 (1987), "overruled" *Beller*, as applying too high a level of scrutiny). Thus, Schowengerdt's argument for a substantive due process violation here is precluded by *Beller*, *Hardwick*, and *High Tech Gays*.[8]

[7] Schowengerdt was discharged pursuant to Secretary of the Navy Instructions (SECNAVINST) 1900.9D. They provide, in relevant part:

> • • • •
>
> 4. *Policy* Homosexuality is incompatible with military services .... The presence in the military environment of persons who engage in homosexual conduct or who, by their statements demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission .... Such persons shall normally be separated from the naval service in accordance with this instructions.
>
> 5. *Definitions.*
>
> ....
>
> b. Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.
>
> • • • •
>
> 7. *Bases For Administrative Separation.*
>
> ....
>
> b. A member shall be separated under this instruction if, but only if, one or more of the following three approved findings is made: .....
>
> (2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not homosexual or bisexual.

[8] We do not address the allegation of Schowengerdt's complaint that the Navy regulations violate equal protection. An equal protection objection to the Navy's discharge policy is not the same as a substantive due process objection. *See Watkins v. U.S. Army*, 875 F.2d 699, 716-717 (9th Cir. 1989) (en banc) (Norris, concurring), *cert. denied*, 111 S.Ct. 384 (1990);

[7] Schowengerdt's argument that his discharge was arbitrary and capricious because he was never proven to be a bisexual is also meritless. Schowengerdt denies that he is a bisexual. He asserts that his correspondence was fantasy-writing, and he denies that he told the security investigator that he was a bisexual. The discharge board, however, made an express adverse credibility finding in that regard, and found Schowengerdt to be a bisexual. In light of the investigating agent's statement, and Schowengerdt's correspondence, the Board's credibility determination was supported by substantial evidence.[8] It cannot, therefore, properly be characterized as arbitrary or capricious. Finally, Schowengerdt's ninth amendment argument is meritless, because that amendment has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation. *See Standberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986).

III. Conclusion

The search of Schowengerdt's office, desk and credenza without a warrant did not violate the fourth amendment in light of the extreme security measures regularly taken in this workplace. The routine practice of searching employees, their work spaces, and their office furnishings precluded Schowengerdt from having a reasonable expectation of privacy in his office, desk or credenza. Schowengerdt's discharge from the Naval Reserve must also be affirmed because he has raised no constitutional challenge which is not foreclosed by firm precedent. Schowengerdt's other complaints are also meritless. The summary judgments dismissing all of Schowengerdt's claims are **AFFIRMED**.

Beller v. Middendorf, 632 F.2d at 807. Schowengerdt waived any equal protection challenge he may have had to the Navy's policy, however, by failing, as he acknowledged at oral argument, to advance such a contention on this appeal. He has instead confined himself to arguing that he was incorrectly found to be a bisexual.

[8]Contrary to Schowengerdt's unsupported assertion, he was not entitled to put the government to proof "beyond a reasonable doubt" of his bisexuality. An administrative military discharge is not criminal or quasi-criminal in nature, but is governed by traditional administrative law doctrine, tempered by reference to the unique circumstances of the military. *Garrett v. Lehman*, 751 F.2d 997, 1002 (9th Cir. 1985).

APPENDIX B District Court Opinions, Orders,
Findings of Fact, and Conclusions of Law

GOVT 28 Dec 88

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT, Plaintiff, v. THE UNITED STATES OF AMERICA, DEPARTMENT OF THE NAVY, JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C. W. KESSEL; K. D. TILLOTSON; CARL W. JENSEN, and RICHARD S. DAY, Defendants.	No. CV 83-8007-AAH(Px) JUDGMENT Date: ~~November 21~~ December 5, 1988 Time: 10:00 a.m.

Defendants Day, Jensen and Tillotson's Motion for Summary Judgment came on regularly for hearing on Monday, ~~November 21~~ December 5, 1988, before the Honorable A. Andrew Hauk, United States District Judge, and the Court having considered the pleadings, the memorandum of points and authorities, exhibits, declarations and depositions and the oral argument at the time of the hearing, and in accordance with the findings of fact and conclusions of law entered herein,

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IT IS THEREFORE ORDERED that judgment be and the same hereby is entered in favor of the defendants and against the plaintiff, and that this action is dismissed with prejudice as to defendants Day, Jensen and Tillotson.

DATED: December 28, 1988.

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT, Plaintiff, v. THE UNITED STATES OF AMERICA, DEPARTMENT OF THE NAVY, JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C. W. KESSEL; K. D. TILLOTSON; CARL W. JENSEN, and RICHARD S. DAY, Defendants.	No. CV 83-8007-AAH(Px) FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RE MOTION FOR SUMMARY JUDGMENT FILED ON BEHALF OF DEFENDANTS TILLOTSON, JENSEN AND DAY

The defendants' Motion for Summary Judgment came on for hearing on ~~November 21~~ December 5, 1988 before the Honorable A. Andrew Hauk, United States District Judge. After having considered the pleadings, the moving and opposition papers and accompanying documents, exhibits, declarations, and depositions and the oral argument at the time of the hearing, the Court makes the following Findings of Fact and Conclusions of Law:

I

FINDINGS FACTS

Nature Of The Action

1. This action is brought against eight defendants and includes four causes of action. The motion for summary judgment was brought on behalf of defendants Tillotson, Jensen and Day (hereinafter the individual federal defendants) who are sued in their individual capacities under a constitutional tort theory of liability established in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 69 (1971) in "Count II" of the fourth amended complaint. The action arises from the search of plaintiff's office desk and credenza on August 9, 1982 at the Naval Industrial Reserve Ordnance Plant at Pomona, California (the "Facility").

2. The plaintiff alleges that defendants Tillotson and Jensen violated and conspired to violate his Fourth Amendment rights by searching his desk and credenza, and that defendants Day, Tillotson and Jensen violated and conspired to violate his First Amendment rights by later disclosing to others the discoveries made during the search.

The Parties

3. On August 9, 1982 plaintiff was a civilian engineer employed in a civilian capacity by the United States Navy ("Navy") at the Facility, and a chief warrant officer in the Naval Reserve.

4. At all times relevant to this case General Dynamics Corporation ("General Dynamics") was a private corporation contracted by the Navy to provide, inter alia, the maintenance

and security at the Facility. Defendant Charles Kessel ("Kessel") was employed by General Dynamics as an investigator in the Security Division.

5. At all times relevant to this case defendant Kenneth D. Tillotson ("Tillotson") was a Lieutenant Commander in the Navy stationed at the Facility. He was the Acting Commanding Officer at the Facility in August 1982.

6. At all times relevant to this case defendant Carl Jensen ("Jensen") was employed as a Special Agent for the Naval Investigative Services ("NIS"), assigned to the Office of the Special Agent-in-Charge at El Toro, California. His duties were to conduct criminal and counterintelligence investigations and operations for the Navy.

7. At all times relevant to this case Defendant Richard S. Day ("Day") was employed by the Navy in a civilian capacity as the Security Officer stationed at the Navy Ship Weapons System Engineering Station ("NSWSES") at Port Hueneme, California. He was the head of the security office responsible for processing (but not granting) security clearances for civilian and military Navy personnel, including plaintiff's clearance. His duties were to request security clearance investigations, review the applications and requests for security clearance packages to ensure they were complete and accurate, and forward the packages to the Defense Investigative Services ("DIS"), the agency responsible for conducting security clearance background investigations. If the DIS investigation and determination was favorable, that office would notify Day's office, and his office would then issue a certificate of clearance.

Factual Background

8. The Facility is a United States Navy-owned installation where a variety of secret and top-secret military weapons systems are planned, designed and manufactured. The Facility is occupied jointly by General Dynamics Pomona Division and military and civilian employees of the Navy. It houses approximately 7000 employees, of which 15% are employed by the Navy and 85% by General Dynamics. The vast majority of the General Dynamics employees at the Facility work in the areas of weapons research, development, engineering and production, and approximately 95% of these employees are required to have United States government security clearances to work at the Facility.

9. The Facility is an enormous complex occupying over 160 acres and dozens of buildings. Chain link fences topped with barbed wire and interwoven with electronic sensing devices surround the Facility. In addition a steel cable is installed in the fence several feet above ground so that vehicles cannot penetrate it. Concrete barriers fortify the lobby areas, while vehicle entrances are secured not only by guard stations but also with hydraulic barriers which block the passage of vehicles through the gate until inspection is complete. Closed circuit cameras located throughout the Facility are monitored by General Dynamics security officers twenty-four hours a day.

10. General Dynamics' security duties include general maintenance and plant protection as well as monitoring the use and storage of classified government information, guarding the pedestrian and vehicle entrances and exits to the Facility and certain buildings within the Facility, ensuring that classified

information is not removed from the Facility and preventing prohibited items from being brought into the Facility. The contract between NAVPRO and General Dynamics also requires General Dynamics to "investigate act[s] of alleged espionage or sabotage" and report the findings to NAVPRO.

The Plaintiff

11. A military industrial engineer for over 27 years, plaintiff has had extensive and on-going exposure to the security regulations and procedures governing the defense industry. Plaintiff was also a member of the Naval Reserve from July, 1972 until June, 1984. Since his discharge from the Navy in 1954, plaintiff has held a variety of civilian positions with the Navy, the Air Force and the private sector, all involving weapons systems engineering.

12. In addition, from 1966 through 1968 plaintiff had his own consulting firm which specialized in weapons systems engineering. He obtained a secret industrial clearance for his business and for himself which authorized him to maintain classified government documents at his home. Plaintiff converted a portion of his home into an office, which the Defense Industrial Security Clearance Office ("DISCO") inspected regularly to ensure compliance with government regulations regarding the maintenance and storage of classified documents. Plaintiff understood that under the terms of his clearance, any area in his home that he used for his business could be searched by DISCO representatives.

13. Plaintiff began working for the Navy's Naval Ship Weapons System Engineering Station ("NAVSEA") in July, 1972 and

was employed there continuously until early 1983. At the time of the incident which is the subject of this action plaintiff was assigned to the AEGIS program, which involves the design of a variety of shipboard weapons systems. Plaintiff's job was to test and evaluate missiles developed for the AEGIS weapons systems. These weapons systems were first produced for military use in approximately 1975. When plaintiff worked on AEGIS, the United States was the only government with access to the systems he evaluated.

14. Plaintiff worked in Building 4 of the Facility where the Facility's largest number of classified documents, including top secret documents, are stored. Building 4 also has several "strong room and closed areas" where particularly sensitive military documents and hardware are housed. Special badges are required for access to these areas. Because of the large number of classified documents stored there and the special closed areas, Building 4 is one of the most heavily secured buildings at the Facility.

15. Plaintiff's defense-related jobs have required him to hold numerous security clearances. Except for two three-to-four-month periods, plaintiff had held a security clearance continuously since 1955. His clearance has generally been rated "secret," although from time to time he has held special access clearances as well. During the time he was working on the AEGIS project at the Facility, plaintiff held a "secret" clearance, which ranks just below "top secret."

16. In connection with obtaining these security clearances plaintiff has been questioned about his sexual habits. He knew

that an applicant's sexual habits could influence the decision to grant a security clearance.

17. In addition to his Navy engineering job, plaintiff operated a business called "Questant Enterprises," which he describes as a career counseling and resume writing service. He also used this business, however, to facilitate certain sexual activities. He corresponded with prospective sexual partners on Questant Enterprises letterhead, and he paid for sexually explicit photographs and other services with Questant Enterprises checks.

Security Procedures At The Facility

18. Because the business conducted at the Facility is the design, testing and production of secret military weapons systems, virtually every person who works there has been investigated in some fashion, and searches occur daily and continually.

19. Uniformed guards protect each entrance to the Facility. To enter, every employee must display a picture badge, which must be worn and visible at all times on the upper left-hand side of the employee's body. In addition to the employee's name and picture, the badge verifies that the employee has a proper security clearance. If the employee is authorized to bring a car into the Facility, as plaintiff was, a special symbol must appear on the badge.

20. Every time an employee drives a vehicle in or out of the Facility through the vehicle entrance, the employee is required to show the picture badge and the employee's car may be searched by the guards. The vehicle gate guards are authorized to search

the entire car, including the glove compartment, trunk and closed containers inside the car or trunk. Plaintiff was not aware of any limits to the guards' authority to search. The Guard Force Policies and Procedures Manual requires guards to search every car leaving the compound after normal working hours. Plaintiff's car had been searched several times. The guarded vehicle entrance which plaintiff normally used bore a prominent sign stating the following:

ALL VEHICLES SUBJECT TO SEARCH.
YOU MAY OPEN TRUNK YOURSELF OR
GUARD WILL DO IT FOR YOU.

21. Plaintiff testified that all employees -- including himself -- must open all packages for inspection every time they enter or leave the building at the pedestrian entrances, including lobbies, in which he worked. The sign posted at the guard station in the lobby of Building 4 reads:

IDENTIFICATION BADGE MUST BE WORN ON
THE LEFT SIDE ABOVE WAIST ON YOUR OUTER
GARMENT. ALL PACKAGES, BOXES, BRIEFCASES,
PURSES AND SACKS MUST BE OPENED FOR GUARDS'
INSPECTION UPON ENTRY AND EXIT.

22. Employees and their belongings may be searched regardless of whether they consent to the search and even if they claim to have no classified information with them. Plaintiff knew the guards conduct searches both on a random basis and when "someone was tipped off about something."

23. In addition to the stationary guards who search employees and their vehicles at the gates and lobbies as they

enter and exit the Facility, General Dynamics guards also patrol inside the Facility. These guards search the interior of Plaintiff's building daily to ensure that all classified information is properly secured and that no other security regulation is breached. Plaintiff had frequently observed the guards searching his building. Although they might initiate a search at any time, the guards often searched after regular business hours when most of the employees were gone.

24. Security regulations mandate that all unattended classified documents be locked in a safe or other authorized container. Because of this regulation, many NAVSEA employees, including plaintiff, had safes in their offices in which classified documents are locked when not in use. Plaintiff knew that it violated security regulations to leave any classified document unattended on a desk or credenza, inside an unlocked desk or even inside a locked desk.

25. There are also central repository safes located in guarded vaults which hold other classified documents. An attendant monitors these vaults. In addition, certain "closed area" vaults are accessible only to persons with "special badge access."

26. To monitor and enforce these strict security regulations, the guards regularly search individual offices, including the interiors of desks and other office furniture. The "Guard Force Policies and Procedures Manual" explicitly directs guards carefully to inspect unlocked desk drawers for classified material which is not properly secured, and guards have access to keys when necessary.

27. Whenever a guard discovers an improperly stored classified document, the guard confiscates and secures the document and leaves in its place a written security citation for the person who failed to store the material properly. The offending employee must go to a security officer to retrieve the document and to explain the breach of security regulations. After several citations an employee may be terminated.

28. To supplement the plant-wide security services performed by General Dynamics, Navy employees follow a system of double-checking one another to ensure that all security regulations are observed. One employee in each work group is assigned on a rotating basis the responsibility of verifying that the offices and safes of co-workers are properly secured. An office form kept on the top of each safe attesting that all documents are properly stored must be signed and dated by the employee responsible for the safe at the end of the day. After the employee signs the form, the rotating security checker for each work group inspects the safe and co-signs the form.

29. Plaintiff was a participant in this self-monitoring system, and had the duty to "look around and see if there were any classified documents lying around." When it was his turn to check other employees' offices he pulled on desk drawers to see if they were locked and, if not, "might be inclined to look inside and see if there were any documents lying loose, classified documents."

30. In addition to the General Dynamics security force and the work group security checkers, the Navy has its own Security Office at the Facility whose civilian employees make random

inspections of employees' safes and generally assure compliance with security procedures. Plaintiff was aware that General Dynamics investigators such as Kessel conduct special, more detailed security investigations from time to time.

31. Plaintiff knew that the Department of Defense conducts official security inspections of the Facility every six months. In plaintiff's own words this inspection "goes the entire gamut, of inspecting classified documents for proper markings, storage procedures for classified documents, [document] transmittal from the Facility, handling of classified material." In addition, General Dynamics performs a self-inspection between Department of Defense inspections. Finally, each individual must inventory his or her own classified document safe every six months.

32. Plaintiff attended many security briefings while he worked at the Facility. Upon receiving a security clearance, each employee receives a security briefing during which the employee is instructed about the proper manner of safeguarding, transmitting and storing classified material and the necessity of wearing badges at all times. At his initial security briefing, plaintiff was instructed about the various kinds of searches that occurred at the Facility and about his duty tc submit to them.

33. In addition to this initial briefing, plaintiff attended many other security briefings or tutorial sessions during the course of his employment at the Facility. These tutorial sessions are mandatory and, if an employee missed one he had to make it up.

34. The tutorial sessions consist of "[r]efresher courses" on how to protect classified information and include speakers and

films concerning proper security of classified information and the threat of espionage. A vital subject repeatedly addressed in these security sessions is the danger of inducements to divulge classified information, thereby compromising national security. One of the inducements about which plaintiff was specifically warned was pressure to divulge classified information as a result of a romantic or sexual entanglement. Plaintiff characterized the inducement as follows: "Oh, there would sometimes be the blonde that led the man astray . . . gaining information from him. . . . There was usually romance involved of some sort."

35. Plaintiff also received numerous written instructions regarding security procedures at the Facility. For example, the "Industrial Security Manual for Safeguarding Classified Information" is issued to contractors such as General Dynamics by DISCO and is available to all employees at the Facility for their review. Plaintiff was already familiar with the contents of this manual when he came to work at the Facility, because he had received the manual in 1966 when he obtained his security clearance as an independent government contractor. While he was an independent contractor, plaintiff was personally responsible for safeguarding classified documents in accordance with the provisions of the manual.

36. Plaintiff was aware he was also subject to the provisions of a Navy security manual while he worked at the Facility. In addition, a specific set of written security instructions was distributed to the Navy employees at the Facility. Plaintiff had received a copy of these instructions and kept them in his office credenza -- the same credenza

searched by Kessel and Jensen. These instructions set forth the procedures to be followed with regard to searches at the gates and inside the building.

37. In addition to security briefings and written instructions, the Navy held lectures approximately every six months to review the conduct appropriate for government military intelligence emplcyees. To complement these lectures, written "standards of conduct" were regularly disseminated to plaintiff and his Navy co-workers. Navy employees were required to read these instructions regularly and that plaintiff had done so. Plaintiff understood that "associations of a dubious nature" were among the types of conduct forbidden to Navy employees.

38. Plaintiff was required to disclose "any outside interest or any business, any outside employment, anything of that sort." Pursuant to this regulation, plaintiff filed several disclosure forms relating to Questant Enterprises. He disclosed his Questant Enterprises resume writing and career counseling activities, however; but never revealed the use of Questant Enterprises letterhead to procure sexual activities with "swinger" correspondents.

39. All of the NAVSEA technical employees, including plaintiff, had individual offices in Building 4 at the Facility. Their office doors could be locked. However, General Dynamics security and custodial employees as well as certain on-site Navy engineering officers kept duplicate keys permitting them to enter plaintiff's office at any time.

40. Plaintiff kept his current, unclassified project files in his desk drawer. He commingled the personnel files with his

project files despite the fact that he knew "[s]omeone, my boss, might want to go into my desk to look for a [project file] document." He also stored a variety of non-business, personal items in his desk, such as personal letter, semi-precious gems which he collected, rolodex cards and a checkbook. Although plaintiff had a key to his desk, and it was his practice to lock the desk when he left the Facility in the evening, he knew there was a duplicate key which "was available in the event you happened not to be there and some papers or things needed to be retrieved . . . or taken from your desk."

41. Behind his desk was plaintiff's credenza, which could also be locked and for which plaintiff believes there was also a duplicate key. Plaintiff stored a variety of professional materials, bulky project files and miscellaneous personal items in the credenza. He also kept the correspondence, photographs and name cards related to his sexual encounters in the lower left hand drawer of the credenza.

42. Plaintiff kept his sexual materials in the bottom left-hand drawer of the credenza in a large manila envelope. On the outside of the envelope he had written a signed instruction to whomever might find the envelope in the event of his death: "[P]lease destroy this material as I do not want my grieving widow to read it."

43. It was apparent to a reasonable person that from this instruction, plaintiff did not want his family to know about the sexual materials. Nor did he want his supervisor to find out about their existence. Plaintiff believed his supervisor would

have instructed him to remove the sexual materials from the Facility had the supervisor known of their existence and content.

44. Plaintiff did, however, disclose both the nature and location of the sexual materials to a co-worker, Robert Bordeaux. In early 1982, several months before the anonymous call to Kessel, plaintiff described the materials to Bordeaux in some detail and told Bordeaux where they were stored in the credenza.

45. The materials plaintiff kept in the manila envelope consisted of correspondence between plaintiff and women and men with whom he sought sexual relationships. Plaintiff sent and received sexually explicit letters arranging for sexual encounters in groups of two or more. The letters indicated he also belonged to a sex club which purported to have as members women desirous of arranging sexual and romantic relationships. He regularly sent money (called "Love Offerings") to the club's headquarters to finance its operations. The manila envelope also contained magazine advertisements by persons seeking sexual encounters of various kinds. Plaintiff kept copies of his responses (letters and nude photographs) to these advertisements and of his follow-up letters after an encounter occurred.

46. When plaintiff responded to an advertisement by someone seeking a sex partner, he regularly gave out his work telephone number as a way of contacting him. He did this despite the fact that he knew there was a government policy against using government telephones for personal business. Plaintiff admitted that prospective sexual partners did, in fact, call him at work and that such calls had to be routed through the main

switchboard. Because the switchboard operator clearly identifies the Facility as "General Dynamics" when answering calls, every caller would necessarily discovery that plaintiff worked in the defense industry.

47. Plaintiff directly revealed his full name, profession and his connection to the defense industry to his various sexual partners in other ways as well. In various letters, for example, plaintiff described himself as: "a missile engineer"; "a missile engineer for the Navy as well as an active reservist"; "an electronics engineer (Missile Systems)"; "an engineer for the government"; "on military duty in the NAVAIR headquarters for two weeks"; "sometimes go[ing] to Naval Weapons Station, China Lake"; "in the military as a Naval Reserve Chief Petting [sic] Officer (E7)! I work for the Navy as a Civilian, GS-13, Test and Evaluation Engineer." Finally, in one letter he tells the recipient "I'm trying to get my computerized missile failure data bank up-to-date so we can start making various plots to present to management."

48. Plaintiff admitted at his deposition that references in the correspondence to the fact that he was a missile engineer connected with the military "might . . . be harmful." He had considered the possibility that some of the persons with whom he solicited sexual encounters might attempt to blackmail him. Although plaintiff was keenly aware of the dangers of disclosing his defense industry status in the course of secret sexual liaisons, he did not conceal this information.

49. Plaintiff decided to keep his "swinger" correspondence and pictures at his office because he was afraid someone in his

family might discovery them if they were stored at his home and because he wanted ready access to them during the day. He wrote letters, sent and received mail and nude photographs with respect to his sexual correspondents while he was at work.

50. Plaintiff stored the sexual materials in the credenza rather than the desk because he thought a colleague looking for a project document in his absence would be more likely to look in his desk than in his credenza.

The Anonymous Tip Of August 9, 1982 Received By Kessel

51. In the late afternoon of August 9, 1982, Kessel received a telephone call in his office from an anonymous male caller who stated that if Kessel would go to a particular office in Building 4 of the Facility and look in the lower left-hand drawer of the credenza in that office he "would find material that would be of interest to the security department." Accordingly, after the telephone call, Kessel visited the office which the caller had described and found the manila envelope.

Involvement Of Kenneth D. Tillotson In The Case

52. In August 1982, Tillotson was the Acting Commanding Officer for the Navy at the Facility. On the morning of August 10, 1982, Tillotson received a call from Kessel who advised him that Kessel had some information in his office that he wanted to discuss with Tillotson. Tillotson went to Kessel's office and inspected the material discovered by Kessel.

53. Tillotson examined the material noting (i) its sexually explicit nature, (ii) that plaintiff had indicated in some of the letters that he was a Navy employee, a missile engineer, and a Navy warrant officer, and (iii) that plaintiff had included his

Navy business card in some of the correspondence. Tillotson also noted that on the envelope in which the material had been discovered, plaintiff had written a statement to the effect that in the event of his death, the material should be destroyed so that it would not cause his family more grief.

54. Based on his observations, Tillotson was seriously concerned that plaintiff could be a target of blackmail, especially in light of the notation on the envelope indicating plaintiff's fear and concern that his family not find out about his sexual escapades. Because of these concerns, Tillotson immediately called the NIS at El Toro for investigative assistance. NIS Agent Jensen was sent to the Facility in response to that call on that same day.

55. After Jensen had reviewed the material, he indicated his intent to conduct a further search of plaintiff's office. Tillotson, as Acting Commanding Officer, gave Jensen his authorization and accompanied Jensen and Kessel to plaintiff's unlocked office. Tillotson did not assist in the search of plaintiff's office but merely remained in the area.

56. After Jensen had completed the search, he left the Facility and Tillotson had no further contact with him. At a later date, the NIS report of investigation prepared by Jensen was sent to Tillotson's office. Both Tillotson and Captain Wendt ("Wendt"), the Commanding Officer, read the report and Tillotson placed it in the office safe. Tillotson did not provide anyone (other than Wendt) the copy of the report. Tillotson had no contact with anyone at the United States Postal Service ("Postal Service"), the Naval Military Reserve or NSWSES regarding the

discovery of the material, and he did not advise anyone that plaintiff was involved in sodomy and homosexual activities.

Involvement Of Carl Jensen In The Case

57. Jensen became involved in this case for the first time on August 10, 1982. On that day, he was working at the NIS office at El Toro when his supervisor, Special Agent in Charge Charles Van Page ("Page") advised him that Page had received a call from someone at the Facility. Page directed Jensen to go to the Facility and meet with Kessel, a security investigator employed by General Dynamics.

58. In accordance with those instructions, Jensen went to the Facility on that same day and met with Kessel and another investigator employed by General Dynamics. At the meeting, Kessel informed Jensen of the circumstances surrounding the discovery of the material and showed Jensen the material he had found in the plaintiff's office.

59. Jensen examined the material and concluded that plaintiff was involved in heterosexual and bisexual activities involving multiple sexual partners with whom he had solicited sexual encounters through want ads in "swingers" magazines.

60. Jensen noted the following facts which he considered significant: Plaintiff had included his office telephone number and his Navy engineer business card, and nude, sexually suggestive photographs of himself as well as photographs of himself in full Navy uniform in some of the correspondence. One letter received by plaintiff from an Italian stewardess who was seeking sexual relationships primarily with servicemen. Many of

the letters made reference to the fact that Schowengerdt worked for the Navy as a missile engineer.

61. The letters from plaintiff were written on stationary bearing the letterhead "Questant Enterprises," which appeared to be a business with which plaintiff was closely associated and through which he conducted the sexual liaisons. Jensen was aware that plaintiff was working in a Navy weapons missile project and required and held a secret clearance to perform his work.

62. Based on his examination of the materials and his knowledge of plaintiff's work activities, Jensen concluded that plaintiff fit the profile of someone who would be susceptible to blackmail or contact by hostile intelligence agents and, therefore, was a potential security risk to the United States. In addition, Jensen was aware that Navy regulations prohibited homosexual and bisexual activity by military personnel, and he knew that plaintiff was in the Naval Military Reserve. Jensen therefore decided to conduct a further investigation to resolve his suspicions regarding possible blackmail and to determine whether solicitation of sex and the mailing of sexually explicit materials through the United States mails was a violation of the United States postal laws.

63. Jensen decided a further search of plaintiff's office was necessary and was concerned that if plaintiff became aware of the investigation, he might attempt to destroy evidence. Jensen therefore decided to search plaintiff's office immediately. However, before doing so, he contacted Page, his supervisor, to advise him of what he had found, what he intended to do, and to confirm what he understood from his training -- that a government

employer had no legitimate expectation of privacy in a government work space and that a warrant was not required. Page agreed that no warrant was necessary.

64. On that same day, Jensen, accompanied by defendants Tillotson and Kessel and another General Dynamics investigator went to plaintiff's office. Only Jensen conducted the search. The door to plaintiff's office was unlocked, as were the desk and credenza within his office. Jensen searched plaintiff's office looking for evidence of contact by a foreign or hostile agent, evidence that plaintiff had been blackmailed, and further evidence of violations of the postal laws or Navy regulations regarding homosexual or bisexual conduct.

65. During the course of his search, Jensen found more material similar to that discovered by Kessel. He discovered and seized (i) a Japanese/English dictionary with notes and phrases he believed could be evidence of a contact by a foreign agent; (ii) a checkbook from Questant Enterprises which he believed related to plaintiff's sexual encounters and in which foreign foreign agents might be identified; (iii) gemstones found in a Questant Enterprises envelope which he believed could have been used by plaintiff to "pay off" potential blackmailers; and (iv) several photographs of different women whose identity was unknown to Jensen at the time. Jensen seized the photographs because he suspected the women might be related to plaintiff's Questant Enterprises activities, which at the time seemed very unusual and an easy target for blackmail. In short, the items seized related to Jensen's concerns that plaintiff might have become a security risk through blackmail.

66. After completing the search of plaintiff's office, Jensen took the material he had seized and the material Kessel had seized, and returned to his El Toro office. He immediately contacted another agent in his office who specialized in foreign counterintelligence investigations and sought his assistance in reviewing the seized material.

67. On August 17, 1982, Jensen called a United States postal inspector to determine if plaintiff had committed any criminal violations of the postal laws. Jensen described the nature of the material he had discovered but did not identify the plaintiff by name. He was advised by the postal inspector that unless the material established evidence of sexual conduct involving minors, the Postal Service would not pursue the case (even though it might technically violate the laws). That conversation was the only contact Jensen had with the Postal Service concerning plaintiff's activities.

68. Continuing his investigation, Jensen interviewed plaintiff and obtained his consent to search plaintiff's residence. Jensen's investigation uncovered no additional evidence. Jensen ultimately concluded that there was no evidence establishing that plaintiff had been contacted by a hostile agent or was the target of blackmail. On September 16, 1982, Jensen completed his final report of investigation, which was transmitted to various federal agency offices, including NIS, headquarters and region and the FBI, and to plaintiff's Commanding Officer in the Reserve (since the evidence of homosexual or bisexual conduct could bear on his status as a reservist).

69. With the completion of his final report, Jensen was no longer involved in the case. He was not contacted by anyone from DIS concerning plaintiff's subsequent security clearance investigations, and he did not send DIS a copy of his report.

Involvement Of Richard Day In This Case

70. Day first became involved in this matter subsequent to the August 1982 searches. In late October or early November 1982, Day was informed by a personnel staffing specialist at NSWSES, Port Hueneme, of the discovery of the sexually explicit material in plaintiff's office at the Facility. This was also the first time Day was specifically aware that plaintiff was a Navy employee. It was Day's understanding that the personnel specialist advised him of the discovery of the material in plaintiff's office because it might have some impact on plaintiff's security clearance and might require that Day's office request an investigation regarding that clearance.

71. Shortly after learning of the incident, Day was informed that his superior had received a copy of the NIS report relating to the incident. Day was given a copy of the report and instructed to request a limited investigation by DIS to determine whether, in light of the discovery, plaintiff should retain his secret clearance. In compliance with those instructions, Mr. Day submitted a request to DIS for a limited investigation of plaintiff to determine what action plaintiff might take were he subjected to coercion, pressure or blackmail because of his sexual activities. Day did not send DIS, or anyone else, a copy of the NIS report concerning plaintiff.

72. Day heard no more about the matter until he was advised by the personnel specialist that plaintiff had resigned from his Navy engineering job on January 21, 1983. Thereafter, DIS was advised, either by Day or his superior, that plaintiff had resigned, and no further investigation was needed.

73. Sometime in March 1983, a letter addressed to the "Security Officer" for the NAV SEA TECH REP was received in Day's office advising that DIS was attempting to convert plaintiff's security clearance into an industrial (private sector) clearance. The letter asked whether there had been any adverse information developmented subsequent to the granting of plaintiff's secret clearance in 1972. As the Security Officer, Day was obligated to respond to the inquiry, which he did by checking the "yes" box and identifying NIS San Diego as the location where the file with the adverse information could be located.

74. Day was not contacted again by DIS regarding plaintiff. He has no personal knowledge of either the duration of the DIS investigation of plaintiff before completion or what factors may have caused the delay about which plaintiff now complains.

Course Of Events Concerning The Security Clearance Investigation Of Plaintiff Following The August 1982 Incident

75. DISCO is the Department of Defense agency responsible for conducting personnel security clearance investigations under the Defense Industrial Security Program. DISCO records indicate that the agency was first contacted regarding plaintiff on March 1, 1983. On that date, the Transfer/Conversion Board received a

personnel security questionnaire from Northrop Corporation in Hawthorne, requesting that plaintiff's Civil Service Commission (government) clearance be converted to an industrial (private sector) clearance.

76. Pursuant to that request, a DISCO personnel security specialist initiated an investigation by research of the Defense Central Index of Investigations ("DCII") to determine whether any recent investigations had been initiated concerning the subject that warranted review before the clearance was converted. A query of the DCII revealed that plaintiff had been the subject of an NIS investigation in 1982. During this time, DISCO also sent the inquiry regarding adverse information to Day's office. On April 14, 1983, the specialist requested a copy of that file for review. It was not until five days later, April 19, 1983, that DISCO officials received the response from Day indicating the existence of adverse information.

77. Based on the procedures in place at DISCO, if the DISCO investigators were aware of the existence of the NIS report either from the DCII query or from the reference to the report in Day's memorandum, DISCO would have reviewed the NIS report and initiated an expanded investigation of plaintiff to uncover all relevant information. Thus, irrespective of Day's reply to the DISCO inquiry, DISCO would have been aware of the NIS report and proceeded as it did.

78. Day did not provide other information to DISCO or DIS other than the disclosure to DISCO of the existence of the NIS report (a fact of which it was already aware). Day was obligated under the Department of Defense Personnel Security Program,

Paragraph 4-102, to inform authorized agencies whenever adverse information is known to him concerning an individual who is being processed for a security clearance. The pertinent paragraph subsection provides:

> f. Whenever a civilian or military member transfers from one DoD activity to another, the losing organization's security office is responsible for advising the gaining organization of any pending action to suspend, deny or revoke the individual's security clearance as well as any adverse information that may exist in security, personnel or other files. In such instances the clearance shall not be reissued until the questionable information has been adjudicated.

79. The delays in granting plaintiff's clearance were caused by the routine procedures involved in an evaluation of potentially adverse information. In plaintiff's case, DISCO's clearance process began on March 1, 1983, the date the application for conversation of clearance was received from Northrop Corporation. It concluded on April 2, 1984, when the industrial secret clearance was granted. The intervening time included the administrative aspects of the conversion of clearance process (March 1, 1983 - April 25, 1983); completion of the DD Form 48, Personnel Security Questionnaire, which was essential to the conduct of the current investigation (April 25, 1983 - May 27, 1983); completion of that investigation (June 3, 1983 - January 9, 1984); evaluation of the results (October 14,

1983 - January 9, 1984); referral of the completed investigation to the Director of the Industrial Security Clearance Review for adjudication and final clearance determination (January 9, 1984 - March 14, 1984); and referral of the clearance determination to DISCO for implementation (March 14, 1984 - April 2, 1984). A 13-month processing time in cases such as this is usual. A copy of the DISCO investigative report is attached as Exhibit A.

80. Mr. Day's conduct did not cause any delay in the DISCO investigation of plaintiff or in issuing his security clearance.

81. Any conclusion of law deemed to be a finding of fact is incorporated here.

II

CONCLUSIONS OF LAW

Standards For Summary Judgment

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and jurisdiction over plaintiff and individual defendants.

2. Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) ("Liberty Lobby"); Fed.R.Civ.P. 56(c). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Liberty Lobby, 477 U.S. at 247-48, 106 S.Ct. at 2510 (emphasis in original).

3. The threshold question in evaluating a summary judgment motion is whether there is a need for a trial because there exists a genuine factual issue which is capable to being resolved in favor of either party that requires resolution by a fact finder. Liberty lobby, 477 U.S. at 250, 106 S.Ct. at 2511. The determination of whether a given factual dispute requires submission to a jury is governed by the substantive evidentiary standard of proof that would apply at trial in case. Id. at 2514.

4. If the non-moving party will bear the burden of proof at trial on an element essential to its case, and that party fails to make a showing sufficient to establish the existence of that element, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986) ("Celotex"). The summary judgment movant may thus meet its burden of showing the absence of an issue of material fact by pointing out that the plaintiff's proof is lacking concerning an element essential to its case. Celotex, 477 U.S. at 325, 106 S.Ct. at 2554.

5. Where a defendant moves for summary judgment based on the lack of proof of a material fact, the plaintiff must demonstrate that there is sufficient evidence on which the jury could reasonably find for it; "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512.

6. "The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in favor of the

nonmovant." Liberty Lobby, 477 U.S. at 255, 106 S.Ct. at 2513 (citation omitted).

7. And while the evidence of the non-movant plaintiff must be believed and all reasonable inferences drawn in its favor, "[i]f the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-250, 106 S.Ct. at 2511. Id. (Citations omitted).

8. The court finds there are no genuine issues of material fact in this case precluding summary judgment.

Fourth Amendment Allegations

9. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". U.S. CONST. amend. IV. The applicability of the Fourth Amendment turns on whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); see also New Jersey v. T.L.O., 469 U.S. 325, 338, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (1985) ("[t]he Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise 'illegitimate'")

10. Although there may be legitimate privacy expectations in the workplace, such expectations are "far less than those found at home or in some other contexts." O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492, 1502, 94 L.Ed.2d 714 (1987). See also New York v. Burger, ____ U.S. ____, 107 S.Ct. 2636, 2642, 96 L.Ed.2d 601 (1987) ("An expectation of privacy in commercial premises

. . . is different from, and indeed less than, a similar expectation in an individual's home.").

11. A determination of whether an employee has a legitimate expectation of privacy in his work environment depends on the operational realities of the work place, and each situation must be addressed on a case by case basis. Ortega, 107 S.Ct. at 1498.

12. Factors to be considered are: (1) whether the employee can avoid exposing personal matters at his work by simply leaving them at home; (2) whether established office practices shape the employee's expectation of privacy, including, e.g., whether searches of the type the employee was subjected to might occur from time to time; (3) whether other employees might have access to the employee's office, desk, or file cabinets; (4) whether the employee had the only key, and therefore exclusive control of his office; and (5) whether an employee's handbag or briefcase is considered a part of the work place.

13. The court finds that in view of the operational realities in plaintiff's work place stated in the findings of fact, plaintiff did not have a reasonable expectation of privacy in his work place which is protected by the Fourth Amendment.

14. Even if plaintiff had a legitimate privacy expectation in his office, desk, or credenza, the warrantless search is permissible under the Fourth Amendment so long as the search was reasonable within the context in which it took place. Id. What is "reasonable" for workplace searches requires "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Id., quoting United

States v. Place, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1985). In this context this Court must "balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." Id.

15. In balancing the factors present in this case, the court finds the balance tips sharply in favor of the government. The government has a compelling national security interest in maintaining the security at the facility and the invasion of the plaintiff's privacy was by comparison minimal. Neither plaintiff's person nor his briefcase, wallet, purse or other personal container was searched, only his office, desk, and credenza were.

16. A warrant and probable cause is not required in this case because the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search, i.e. maintaining security at the facility. Id.

17. The search must nevertheless be reasonable under all the circumstances. Id. at 1502-3.

18. In this case, the search conducted by Jensen was reasonable. It was justified at its inception based on all the facts known to him since Jensen had a reasonable suspicion that evidence of work related misconduct, i.e., blackmail, violation of Postal Service laws or Navy regulations, would be found in plaintiff's office, and the search was reasonably tailored to the discovery of that evidence and not excessively intrusive in light of the suspected misconduct. New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed. 720 (1985).

19. Defendant Tillotson did not personally participate in the search of plaintiff's office and is not liable for Jensen's conduct under a theory of respondeat superior or vicarious liability for violation of plaintiff's Fourth Amendment rights. Leer v. Murphy, 844 F.2d 623, 633 (9th Cir. 1988), Mann v. Adams, 846 F.2d 589, 591 (9th Cir. 1988) reh. denied, 855 F.2d 639 (9th Cir. 1988).

20. Neither Jensen nor Tillotson violated plaintiff's Fourth Amendment rights.

Qualified Immunity On Fourth Amendment Allegations

21. Government officials performing discretionary functions are shielded from civil damages liability as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

22. Whether an official may appropriately rely upon the qualified immunity defense centers on the objective legal reasonableness of the conduct in question in light of the clearly established law at the time. Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. The subjective intent or good faith of the particular official is generally irrelevant to this inquiry. Harlow, 457 U.S. at 815-819, 102 S.Ct. at 2736-39.

23. The clearly established law that the government official is alleged to have violated may not be identified at any level of generality. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is

doing violates that right." Anderson v. Creighton, 483 U.S. ___, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

24. The Supreme Court has stated that "it is inevitable law enforcement officials will in some cases reasonably but mistakenly believe that [their conduct is constitutionally permissible] and we have indicated that in such cases those officers -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable." Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. at 3039.

25. A law enforcement officer is not entitled to a qualified immunity if, on an objective basis, it is obvious that a reasonably competent officer would have concluded that the challenged conduct was unlawful; but if officers of reasonable competence could disagree on the issue, immunity should be recognized. Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986) (emphasis added).

26. The qualified immunity defense protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, ibid.

27. Damage suits involving constitutional violations need not proceed to trial, but may be terminated on a properly supported summary judgment motion based on the qualified immunity defense. Butz v. Economou, 438 U.S. 478, 508, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978).

28. In determining what the clearly established law was at the time in question, this court must look first to decisions of the Supreme Court and the Ninth Circuit. Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985). In the absence of such binding

precedent, the court must then look to whatever decisional law is available, including decisions by other Circuits, by district courts, and by state courts. Ibid.

29. The court's research discloses that no Supreme Court or Ninth Circuit case in August 1982 addressed the issue of search of an employee's work space in a factual context sufficiently analogous so as to clearly establish that the defendants' conduct violated plaintiff's Fourth Amendment rights. On the contrary, the holding of United States v. Bunkers, 521 F.2d 1217 (9th Cir.) cert. denied, 423 U.S. 989, 96 S.Ct. 400, 46 L.Ed.2d 307 (1975) suggests the defendant's conduct did not violate plaintiff's constitutional rights.

30. Furthermore, the discussion of the issue in Ortega indicates that prior to that decision the law was not clearly established at the time of the incident, August 9, 1982.

31. Even if they had violated plaintiff's Fourth Amendment rights, defendants Jensen and Tillotson therefore are entitled to qualified immunity regarding the allegation that they violated plaintiff's Fourth Amendment rights in searching his office.

Allegations Relating To Disclosure Of Information Regarding Plaintiff

32. The information regarding plaintiff's "swinger" sexual activities found in his work place are not protected from non-disclosure by the general right to privacy recognized in the "penumbra" of fundamental rights found in the Bill of Rights, because they do not arise out of marriage and procreation and are not fundamental to the concept or ordered liberty. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 402 (1976).

33. Even assuming the information were constitutionally protected against disclosure by the government, the disclosures made by the defendants in this case were warranted and constitutional under the balancing test enunciated in Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983).

34. The investigation and disclosures made by Day, Jensen and Tillotson were directly and specifically related to legitimate work-related concerns that plaintiff was a security risk or had violated federal law or regulation. The disclosure of the information was strictly limited and narrowly tailored to meet those concerns.

35. Jensen's disclosure of his NIS investigative report were authorized under the Privacy Act, 5 U.S.C. § 552(b)(1) and (b)(3), and the holding in Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

36. The disclosure by Day was in compliance with his official duties. There is no evidence that the disclosure by Day caused any delay in the issuance of plaintiff's private sector security clearance.

Qualified Immunity On Disclosure Of Information

37. The law regarding the existence or the extent of a constitutional right to non-disclosure of confidential information by the government in the factual context of this case was not clearly established in August, 1982. Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986); Borucki v. City of New York, 827.F.2d 836 (1st Cir. 1986).

38. The court finds that a reasonable and competent officer confronted with the circumstances in this case could have

concluded that the dissemination of the information made in this case was constitutionally permissible in light of the clearly established law.

39. Accordingly, even assuming that defendants violated plaintiff's constitutional right to privacy by disclosing the information, they are nevertheless entitled to qualified immunity because a reasonable officer could have believed his conduct was lawful in light of clearly established law and information. Anderson v. Creighton, ____ U.S. ____, 107 S.Ct. at 3040.

Conspiracy Allegations

40. To establish an actional Bivens conspiracy, the plaintiff must establish the existence of a single plan, the essential nature and general scope of which were known to the defendants, and an actual deprivation of his constitutional rights. Hobson v. Wilson, 737 F.2d 1, 5152 (D.C. Cir.), cert. denied, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1984); Dooley v. Reiss, 736 F.2d 1392, 1395 (9th Cir. 1984).

41. There is no evidence of a plan or conspiracy between or among any of the Bivens defendants in this case.

42. Even if plaintiff had produced evidence of a plan or conspiracy, there were no deprivations of plaintiff's constitutional rights.

43. Defendants did not conspire to deprive plaintiff of his constitutional rights.

44. However, even if plaintiff had established that defendants conspired to deprive plaintiff of his constitutional rights, defendants are nevertheless entitled to qualified immunity because the law regarding the existence and extent of

the constitutional rights was not clearly established as stated in conclusions of law numbers 29 and 37.

45. There are no genuine issues of material fact in dispute respecting any of the allegations in plaintiff's second cause of action of the fourth amended complaint and the defendants Day, Jensen and Tillotson are entitled to judgment in their favor as a matter of law.

46. Judgment should be entered for defendants Tillotson, Day and Jensen and against plaintiff as to the second cause of action.

DATED: December 28, 1988.

A. ANDREW HAUK

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT, Plaintiff, v. THE UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C.W. KESSEL; K.A. TILLOTSON; CARL W. JENSEN; and RICHARD S. DAY, Defendants.	No. CV 83-8007-AAH (Px) JUDGMENT

This motion of defendants General Dynamics Corporation and C.W. Kessel (the "Private Defendants") for summary judgment on the Second Cause of Action of the Complaint of plaintiff Richard Neal Schowengerdt ("Plaintiff") pursuant to Federal Rule of Civil Procedure 56 and to dismiss the pendent state law claims set out in the Fourth and Fifth Causes of Action of the Complaint for lack of pendent jurisdiction came on for hearing before the Court, the Honorable Andrew A. Hauk presiding.

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Now on considering the pleadings and papers in the action and having heard oral argument and found that there is no genuine issue of material fact regarding Plaintiff's Second Cause of Action based on the Findings Of Uncontroverted Facts And Conclusions Of Law and a decision having been rendered that Private Defendants are entitled to summary judgment on that claim as a matter of law, it is hereby

ORDERED, ADJUDGED AND DECREED that Private Defendants' motion for summary judgment on the Second Cause of Action of the Complaint and to dismiss the pendent state law claim set out in the Fourth and Fifth Causes of Action be granted and that summary judgment be entered herein in the Private Defendants' favor dismissing the Complaint as to the Private Defendants in its entirety.

Dated: Dec. 23, 1988

A. Wallace Hall

JUDGE OF THE UNITED STATES
DISTRICT COURT

5761Q

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DEC 2 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT, Plaintiff, v. THE UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C.W. KESSEL; K.A. TILLOTSON; CARL W. JENSEN; and RICHARD S. DAY, Defendants.	No. CV 83-8007-AAH (Px) FINDINGS OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW RE: SUMMARY JUDGMENT IN FAVOR OF PRIVATE DEFENDANTS

This matter came on regularly for hearing before the Honorable Andrew A. Hauk, Judge of the United States District Court, on December 5, 1988, and the defendants having appeared by their respective counsel and the plaintiff having appeared in pro per and the parties having filed pleadings and papers in support of and in opposition to the motion of defendants General Dynamics Corporation and C.W. Kessel (the "Private Defendants") for summary

judgment in their favor dismissing Plaintiff's Second Cause of Action and to dismiss the pendent state law claims set out in the Fourth and Fifth Causes of Action of the Complaint for lack of pendent jurisdiction, and the matter having been argued and submitted, the Court makes the following findings of fact and conclusions of law.

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STATEMENT OF UNCONTROVERTED FACTS

1. At all times relevant to the Second Cause of Action, plaintiff Richard Neal Schowengerdt ("Plaintiff") was a military industrial engineer who was a civilian employee of the United States Navy (the "Navy") working at the Naval Industrial Reserve Ordnance Plant at Pomona, California (the "Facility").

2. Defendant General Dynamics Corporation ("General Dynamics") operated and provided security services at the Facility pursuant to a contract with the Navy which, among other things, required General Dynamics to perform general security, plant protection and classified document control functions and to investigate alleged espionage or sabotage at the Facility.

3. At all times relevant to the Second Cause of Action, defendant C.W. Kessel ("Kessel") worked for General Dynamics as an investigator in its security department at the Facility.

4. At all times relevant to the Second Cause of Action, Plaintiff held a "secret" security clearance and was subject to and had extensive and ongoing exposure to the security regulations and procedures governing the defense industry.

5. Plaintiff's office was located in Building 4 of the Facility where a large number of classified documents, including top secret documents, were stored and where numerous "strong rooms and closed areas" containing particularly sensitive military and national security documents and hardware were located.

6. Plaintiff was aware that every time an employee entered or exited the Facility, the employee and the employee's belongings, including all packages, briefcases and purses, were subject to search regardless of the employee's consent, by guards

at pedestrian entrances to the Facility and by guards at vehicle gates who had the authority to search all vehicles arriving at or departing from the Facility, including the glove compartments, trunks and closed containers inside a vehicle or trunk.

7. Plaintiff was aware that guards regularly searched inside individual offices and inside desks and other office furniture in Building 4 of the Facility in order to monitor and enforce security regulations concerning classified documents and that such searches could be conducted in response to tips concerning security breaches.

8. Plaintiff himself periodically participated in searches of the offices and desks of co-workers to be sure that no breaches of security occurred at the Facility.

9. Plaintiff received numerous security briefings about the various kinds of searches that occurred at the Facility and about his duty to submit to such searches, and Plaintiff received numerous written instructions regarding security procedures at the Facility.

10. Plaintiff was aware that numerous individuals, including General Dynamics security and custodial employees and on-site Navy engineering officers, possessed duplicate keys permitting them to enter Plaintiff's office at any time.

11. Plaintiff was aware that the engineering officer at the Facility possessed duplicate keys to the desk and the credenza in Plaintiff's office which were available so that documents in Plaintiff's desk or credenza could be retrieved in Plaintiff's absence.

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12. Prior to the events giving rise to the Second Cause of Action, Plaintiff stored a manila envelope containing sexually-explicit correspondence, photographs and other materials related to various extra-marital sexual encounters with "swingers" in the lower left-hand drawer of the credenza in his office. The outside of this manila envelope bore a handwritten request that in the event of Plaintiff's death the material be destroyed because Plaintiff did not wish his widow to know of it.

13. The materials in the manila envelope contained references to the central telephone number at the Facility and explicit references to the defense-industry nature of Plaintiff's employment.

14. In the late afternoon of August 9, 1982, Kessel received a telephone call in his office from an anonymous male caller who stated that if Kessel would go to a particular office in Building 4 of the Facility and search the lower left-hand drawer of the credenza in that office he would find material that would be of interest to the security department. The caller did not identify the employee who worked in the office and, prior to entering Plaintiff's office in response to the call, Kessel had never heard of Plaintiff and had no prior dealings with him.

15. Kessel proceeded to Plaintiff's office in response to the call and entered it through the unlocked door of the office. Upon opening the unlocked lower left-hand drawer of the credenza, Kessel saw and brielfly inspected the unsealed manila envelope containing the sexual materials.

16. Upon reviewing the materials in the envelope, Kessel determined that the author was readily subject to blackmail or

other inducements by his sexual contacts that could lead to the compromise of classified information since the author had disclosed the nature of his work in the military defense industry in a number of these pieces of correspondence and the author's wife did not know about these sexual contacts.

17. In accordance with General Dynamics' contractual obligation to report to the Navy information suggesting the possibility of a compromise of security, Kessel took the envelope and its contents to Kessel's office to confirm whether he was required to report the contents of the manila envelope to the Navy.

18. On the following day, August 10, 1982, Kessel gave the material to the Navy Commander of the Facility, Lieutenant Commander K. A. Tillotson, and, at Tillotson's direction, Kessel and Clarence Johnson, a General Dynamics security investigator, escorted Tillotson and Navy Investigator Carl W. Jensen to Plaintiff's office where Jensen and Tillotson conducted a further search of Plaintiff's files. Neither Kessel, Johnson nor any other General Dynamics' employee participated in this search.

19. After transferring the material to Plaintiff's Navy superiors and escorting the Navy officials to Plaintiff's office on August 10, 1982, neither Kessel nor any other General Dynamics employee had any other further connection with any investigation of Plaintiff.

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20. All Findings of Fact set forth under the heading "Conclusions of Law" and in the Motions for Summary Judgment of the Public Defendants at pp 4:20 to 17:6 and the Private Defendants at pp 5:23 to pp 17:9, and in the Private Defendants' Reply to Plaintiff's Ojbections, etc. at pp. 20-21 are incorporated herein by reference.

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CONCLUSIONS OF LAW

1. All Conclusions of Law set forth under the heading "Findings of Fact" are incorporated herein by reference.

2. Summary judgment shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

7. The actual office practices, procedures and legitimate regulations in place at the Facility precluded Plaintiff from having a reasonable expectation of privacy in the contents of his credenza.

8. The pleadings, papers, deposition excerpts and declarations on file herein establish that there is no genuine issue of material fact that the operational realities of Plaintiff's workplace precluded him from having a reasonable expectation of privacy in the contents of his office credenza as a matter of law, and the Private Defendants are entitled to judgment in their favor against Plaintiff with respect to his Second Cause of Action as a matter of law.

9. Even if a government employee has a legitimate privacy expectation in the workplace, a warrantless search of the public employee's workplace is permissible under the Fourth Amendment so long as the search is reasonable within the context in which it takes place. O'Connor, 107 S. Ct. at 1499.

10. Neither a warrant nor probable cause is necessary for conducting a search of the workplace of a public employee so long as the search concerns work-related, noninvestigatory intrusions or investigations of work-related misconduct. Id. at 1502.

11. A search of the workplace of a public employee is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that an employee is guilty of work-related misconduct or that the search is necessary for a noninvestigatory work-related purpose, and such a search is permissible in its scope when the measures adopted are

reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the alleged misconduct. Id. at 1503.

12. The pleadings, papers, deposition excerpts and declarations on file herein establish that there is no genuine issue of material fact that the inception and scope of Kessel's search were reasonable within the context in which the search occurred, and the Private Defendants are entitled to judgment in their favor against Plaintiff with respect to Plaintiff's Second Cause of Action as a matter of law.

13. A warrantless search in a heavily-regulated industry is reasonable if (1) the regulatory scheme pursuant to which the search is conducted carries out a substantial government interest, (2) the warrantless inspection is necessary to carry out the regulatory scheme, and (3) the inspection program provides a constitutionally adequate substitute for a warrant. New York v. Burger, ___ U.S. ___, 107 S. Ct. 2636, 2644, 96 L.Ed.2d 601 (1987)

14. Regulations in a heavily-regulated industry can provide an employee notice that the employee's property may be subject to periodic inspection undertaken for specific purposes and can therefore provide a constitutionally adequate substitute for a warrant. Id.

15. The pleadings, papers, deposition excerpts and declarations on file herein establish that there is no genuine issue of material fact that the Facility is part of a heavily-regulated industry and that Kessel's inspection of Plaintiff's credenza was a reasonable warrantless inspection in such an industry, and the Private Defendants are entitled to

judgment in their favor against Plaintiff with respect to Plaintiff's Second Cause of Action as a matter of law.

16. In determining whether a disclosure of information by government agents is constitutional, it is appropriate to weigh any intrusion into an individual's zone of privacy against the public interest in and reason for the disclosure.

17. The pleadings, papers, deposition excerpts and declarations on file herein establish that there is no genuine issue of material fact that Kessel's disclosure of the information concerning Plaintiff did not violate Plaintiff's constitutional rights, and the Private Defendants are entitled to judgment in their favor against Plaintiff with respect to Plaintiff's Second Cause of Action as a matter of law.

18. The defense of qualified immunity may be properly established on a motion for summary judgment when, by declarations, depositions and admissions, a set of undisputed facts is revealed upon which the moving party is entitled to judgment as a matter of law. Standridge v. City of Seaside, 545 F. Supp. 1195, 1198 n.1 (N.D.Cal. 1982).

19. Officials performing discretionary government functions are protected from personal liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have knowledge. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d. 396 (1982).

20. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of

the action assessed in light of the legal rules that were clearly established at the time the action was taken. Anderson v. Creighton, ___ U.S. ___, 107 S. Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

21. Plaintiff sufficiently alleges in the Second Cause of Action (which incorporates paragraphs 11, and 10-15 of the Complaint) that the Private Defendants were federal actors acting under federal law. Schowengerdt . General Dynamics Corporation, 823 F2d 1328, 1332 n.3 (9th Cir. 1987). See also: Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29

24. There are no genuine issues of material fact or evidence of a plan or conspiracy between or among Private Defendants and any of the Bivens defendants in this case.

25. There are no genuine issues of material fact in dispute respecting any of the allegations against the Private Defendants in plaintiff's second cause of action of the Fourth Amended Complaint, and defendants General Dynamics Corporation and Kessel are entitled to judgment in their favor as a matter of law.

26. Judgment should be entered for the Private Defendants and against Plaintiff as to the second cause of action.

27. In light of the summary judgment granted herein as to the Second Cause of Action, the only federal action stated against the Private Defendants in the Complaint, this Court declines to exercise jurisdiction over the Fourth and Fifth Causes of Action on the basis of the principles set out in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 1139-40, 16 L.Ed.2d 218 (1966) and dismisses the Complaint as to the Private Defendants in its entirety.

DATED: April 25th, 1988

JUDGE OF THE UNITED STATES
DISTRICT COURT

5761Q

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT, Plaintiff, v. THE UNITED STATES OF AMERICA, DEPARTMENT OF THE NAVY, JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C. W. KESSEL; K. D. TILLOTSON; CARL W. JENSEN, and RICHARD S. DAY, Defendants.	No. CV 83-8007-AAH(Px) JUDGMENT Date: April 10, 1989 Time: 10:00 A.M.

Defendant United States' Motion for Summary Judgment came on regularly for hearing on Monday, April 10, 1989, before the Honorable A. Andrew Hauk, United States District Judge, and the Court having considered the pleadings, the memorandum of points and authorities, exhibits, and the oral argument at the time of the hearing, and in accordance with the findings of fact and conclusions of law entered herein,

- 55 -

IT IS THEREFORE ORDERED that judgment be and the same hereby is entered in favor of the defendant United States and against the plaintiff and that the first cause of action is dismissed with prejudice. This is a final judgment entered in accordance with Rule 54(b), F.R.Civ.P.

DATED: April ____, 1989.

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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Gov't 27 Apr 1989

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT,

Plaintiff,

v.

THE UNITED STATES OF AMERICA, DEPARTMENT OF THE NAVY, JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C. W. KESSEL; K. D. TILLOTSON; CARL W. JENSEN, and RICHARD S. DAY,

Defendants.

No. CV 83-8007-AAH(Px)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Date: April 10, 1989
Time: 10:00 A.M.

The defendants' Motion for Summary Judgment came on for hearing on April 10, 1989 before the Honorable A. Andrew Hauk, United States District Judge. The Court having considered the pleadings, the moving and opposition papers and accompanying documents, exhibits, and the oral argument at the time of the hearing, now makes the following findings of fact and conclusions of law in addition to the court's oral findings of fact and conclusions of law which are hereby incorporated herein.

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I

UNCONTROVERTED FACTS

The Court adopts the Findings of Fact In Re Motion For Summary Judgment Filed on Behalf of Defendants Tillotson, Jensen, and Day which were filed on December 29, 1988 and incorporates them by reference as though fully set forth here.

II

CONCLUSIONS OF LAW

1. Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) ("Liberty Lobby"); Fed.R.Civ.P. 56(c). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Liberty Lobby, 477 U.S. at 247-48, 106 S.Ct. at 2510 (emphasis in original).

2. The threshold question in evaluating a summary judgment motion is whether there is a need for a trial because there exists a genuine factual issue which is capable to being resolved in favor of either party that requires resolution by a fact finder. Liberty Lobby, 477 U.S. at 250, 106 S.Ct. at 2511. The determination of whether a given factual dispute requires submission to a jury is governed by the substantive evidentiary standard of proof that would apply at trial in case. Id. at 2514.

-58

3. If the non-moving party will bear the burden of proof at trial on an element essential to its case, and that party fails to make a showing sufficient to establish the existence of that element, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986) ("Celotex"). The summary judgment movant may thus meet its burden of showing the absence of an issue of material fact by pointing out that the plaintiff's proof is lacking concerning an element essential to its case. Celotex, 477 U.S. at 325, 106 S.Ct. at 2554.

4. Where a defendant moves for summary judgment based on the lack of proof of a material fact, the plaintiff must demonstrate that there is sufficient evidence on which the jury could reasonably find for it; "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512. "The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in favor of the nonmovant." Liberty Lobby, 477 U.S. at 255, 106 S.Ct. at 2513 (citation omitted).

5. And while the evidence of the non-movant plaintiff must be believed and all reasonable inferences drawn in its favor, "[i]f the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-250, 106 S.Ct. at 2511. Id. (Citations omitted).

6. The allegations in paragraph 11 of the fourth amended complaint allege an invasion of privacy -- more specifically -- the tort of intrusion into private affairs.

7. The lack of clarity of the meaning of "wrongfully and erroneously" in paragraphs 12-14 of the complaint requires analysis of those allegations under two theories of common law tort liability. If plaintiff intends to allege that the disclosures were "wrongful and erroneous" because the information disclosed was false, then the allegations are properly characterized as libel or slander. If plaintiff intends to allege that the disclosures were "wrongful and erroneous" because, even if true, should not have been made, then the tort alleged is public disclosure of private facts - one of the four branches of the general invasion of privacy tort recognized in California. See generally Vol. 5, B.E. Witkin Summary of California Law, 1988, §§ 577-592, pp. 672-89. For the reasons set forth below, none of these torts are actionable in this case.

8. The Federal Tort Claims Act, 28 U.S.C. § 2680(h), bars "Any claim arising out of . . . libel, slander, misrepresentation . . . ." In determining whether a claim is barred by § 2680(h) the court must look beyond the label to determine if the claim is barred. Thomas-Lazear v. F.B.I., 851 F.2d 1202, 1207 (9th Cir. 1988). Moreover, section 2680(h) does not merely bar claims that are specifically labeled as those stated in § 2680(h). "In sweeping language it excludes any claims arising out of [slander, libel, or misrepresentation]." United States v. Shearer, 473 U.S. 52, 55, 105 S.Ct. 3039, 3042, 87 L.Ed. 38 (1985).

9. If the essential wrong plaintiff is alleging in paragraphs 12-14 of the fourth amended complaint by the language

"wrongful and erroneous disclosure" is that a matter was 1) published i.e. communicated to a third person who understands its meaning and application to the plaintiff, 2) that is false and unprivileged and, 3) which expose the person contempt or ridicule or has a tendency to injure him in his occupation, then plaintiff's claims arise out of slander and libel. (See Vol. 5. B.Witkin, Summary of California Law, 1988, §§ 471-481 pp. 557-565). 1/ These causes of action are therefore barred by 28 U.S.C. §2680(c).

10. The elements of the tort of public disclosure of private facts are 1) public disclosure, 2) of a private fact, 3) which would be offensive and objectionable to the reasonable person and, 4) which is not of legitimate public concern. Diaz v. Oakland Tribune, Inc., 139 Cal.App. 3rd 118, 126, 188 Cal. Rptr. 762 (1983). "Public disclosure" in this context means publicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few. It must be a public disclosure, not a private one. Kinsey v. Macur, 107 Cal.App. 3rd 265, 271, 165 Cal.Rptr. 608 (1980). Communications to a single recipient for a specific, nonmalicious purpose does not constitute invasion of privacy. Id. at 272.

1/ California law governs the liability of the United States under the Federal Tort Claims Act in this case because California is the place where the acts occurred. 28 U.S.C. § 1346; Garcia v. United States, 826 F.2d 806, 809 (9th Cir. 1987).

11. With respect to paragraph 12, plaintiff alleges that federal employees advised the Postal Service that plaintiff was sending and receiving pornographic literature and photographs through the mail. Based on the evidence this conduct does not constitute public disclosure of private facts.

The conversation did not identify the plaintiff by name. The recipient of the information from Jensen at the Postal Service could not have attributed the actions to the plaintiff. Thus, the communication can not be characterized as a disclosure at all. Jensen's conversation with an agent of the Postal Service does not constitute a publication. It was not communication to the public in general or even to a large number of persons. It was merely a communication to a single recipient for a specific, nonmalicious purpose. Such communication is not an invasion of privacy. Id.

12. Paragraph 13 of the fourth amended complaint alleges that federal employees wrongfully and erroneously advised plaintiff's employer and the Naval Reserve that plaintiff was involved in sodomy and homosexual activity. Based on the evidence and conclusions of law entered previously, the conduct does not constitute public disclosure of private facts. There was no publication; it was a disclosure made to a very limited group for a legitimate governmental purpose. The disclosure therefore fails to meet elements 1 and 4 of the tort of invasion of privacy. The disclosure cannot be characterized as offensive and objectionable to the reasonable person. It was done out of a legitimate public concern -- that plaintiff's employers be aware

that he may have engaged in conduct prohibited under the terms and conditions of his employment.

13. The findings of fact and conclusions of law entered by this Court with respect to paragraph 14 of the complaint similarly preclude a finding of invasion of privacy. In that paragraph, plaintiff alleges federal employee Day wrongfully and erroneously notified the Defense Investigation Service that plaintiff was a security risk, thereby causing plaintiff's security interest to be withheld for over one year.

14. In view of the findings of fact 73-80 and conclusion of law 34-36 previously entered, plaintiff cannot establish that there was a public disclosure by Day. The evidence establishes that the disclosure by Day was not that plaintiff was a security risk, but rather that certain events had occurred subsequent to the granting of his initial clearance which may have a bearing on the status of his clearance. It was made to one person only. Nor can he establish that the disclosure was offensive and objectionable to the reasonable person. The court finds that was reasonable. Finally, plaintiff cannot establish that the disclosure did not relate to a legitimate public concern. The court finds that it related to legitimate public concerns that plaintiff might be a security risk. The United States is therefore, entitled to judgment as a matter of law as to the allegations of paragraphs 12-14.

15. Plaintiff alleges in paragraph 11 of his fourth amended complaint that federal employees wrongfully and unlawfully entered his office and seized photographs and letters pertaining

to his private sexual life, as well as other personal property. Plaintiff cannot establish facts sufficient to prevail on a theory of intrusion into private affairs - another branch of the tort of invasion of privacy.

16. Under applicable California law the elements for this tort are: 1) intrusion (physically or otherwise), 2) upon the solitude of another or his private affairs, 3) which is highly offensive to a reasonable person. Miller v. National Broadcasting Company, 187 Cal.App.3d 1463, 1482, 232 Cal.Rptr. 668 (1986) (citing the Restatement Second of Torts, section 652B). In determining what is highly offensive, a court must consider:

> the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion, as well as the intruder's motives, and objectives, the setting into which he intrudes, and the expectation of those whose privacy is invaded.

Id. at 1484-85.

17. Based on the findings of fact 3-69 and conclusions of law 11-14 previously entered, and the standards set forth in Miller v. National Broadcasting, supra, the Court finds as a matter of law that defendants are not liable to the plaintiff for invasion of privacy in connection with the search of his office and seizure of his documents. Plaintiff had no expectation of privacy in the area. Thus, plaintiff cannot establish that his privacy, i.e. seclusion and solitude, was invaded. The search

was motivated for reasons directly relating to issues of national security (suspicion that plaintiff may be a security risk), suspicion of criminal violations of the Postal laws, or concern that plaintiff's conduct may preclude his continued service in the military. Given those considerations, plaintiff cannot establish that the intrusion was "highly offensive to a reasonable person." Indeed the Court has found it was reasonable. Accordingly, the United States is entitled to judgment as a matter of law as to paragraph 11 of the fourth amended complaint.

18. Any finding of fact erroneously designated a conclusion of law is incorporated here.

19. There are no genuine issues of material fact in dispute respecting any of the plaintiff's first cause of action alleged in his fourth amended complaint and defendant United States of America is entitled to judgment in their favor as a matter of law.

20. Judgment should be entered for those defendants and against plaintiff.

21. This judgment is entered as a final judgment even though it disposes of few than all of the claims and liabilities of fewer than all of the parties. The Court finds that there is no just reason for delay and therefore expressly enters judgment pursuant to Rule 54(b), F.R.Civ.P.

DATED: April 21, 1989.

A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT, Plaintiff, v. THE UNITED STATES OF AMERICA, DEPARTMENT OF THE NAVY, JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C.W. KESSEL; K. D. TILLOTSON; CARL W. JENSEN, and RICHARD S. Day, Defendants.	No. CV 83-8007-AAH(Px) Summary JUDGMENT Date: November 13, 1989 Time: 10:00 A.M.

Defendants Department of the Navy and the Secretary of the Navy's Motion for Summary Judgment came on regularly for hearing on Monday, November 13, 1989 before the Honorable A. Andrew Hauk, United States District Judge, and the Court having considered the pleadings, the memorandum of points and authorities, exhibits, and the oral argument at the time of the hearing, and in accordance with the findings of fact and conclusions of law entered herein.

-67-

IT IS THEREFORE ORDERED that judgment be and the same hereby is entered in favor of the defendants Department of the Navy and the Secretary of the Navy and against the plaintiff and that the first cause of action is dismissed with prejudice. This is a final judgment entered in accordance with Rule 54(b), F.R.Civ.P.

DATED: ~~September 12~~ November 13, 1989.

A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT, Plaintiff, v. THE UNITED STATES OF AMERICA, DEPARTMENT OF THE NAVY, JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C.W. KESSEL; K. D. TILLOTSON; CARL W. JENSEN, and RICHARD S. Day, Defendants.	No. CV 83-8007-AAH(Px) Date: November 13, 1989 Time: 10:00 A.M.

STATEMENT OF UNCONTROVERTED

FACTS AND CONCLUSIONS OF LAW

-69-

I

UNCONTROVERTED FACTS

1. In this motion, the defendants the Department of Navy and the Secretary of the Navy, move for summary judgment in their favor regarding the third cause of action ("Count III") set forth in the Fourth Amended Complaint.

2. Plaintiff maintains that his Constitutional rights secured under the First, Fourth, Fifth and Ninth Amendment were violated when he was discharged from the Naval Reserves. He also alleges that the decision to discharge him was arbitrary and capricious and not supported by substantial evidence. He seeks declaratory relief and reinstatement to his former position with the Naval Reserve with all "rights and benefits to which he is entitled."

3. As a result of the discovery of the evidence in plaintiff's office at his employment as a civilian engineer with the United States Navy at the NAVSEA facility at Pomona (see Findings of Fact and Conclusions of Law ("FFCC") entered by this Court on December 12, 1988, ¶¶ 1-80), plaintiff was discharged from the Navy. He held the rank of a chief warrant office in the Naval Reserve and was assigned to the Pacific Missile Test Center at Point Magu, California.

4. The Navy initiated plaintiff's discharge by memorandum dated March 8, 1983. In that memorandum, plaintiff was advised that he was to be separated as a member of the Naval Reserve because he had admitted to being bisexual. Concurrently with the issuance of that memorandum, the Navy requested that a board of officers be convened to consider plaintiff's case. Plaintiff

rejected the option of resignation and advised the Navy he would appear before the board of officers.

5. By memorandum dated April 20, 1983, plaintiff was informed of his rights before the board and given a copy of the Navy policy concerning homosexuals. Among the rights provided to plaintiff at his hearing before the board were the right to military appointed counsel, full access to all statements, documents or records to be considered by the board, the names of all witnesses, the right to present evidence, sworn statements, argument, and rebuttal, and the right to cross examine any witness.

6. On June 23, 1983, the board convened to hear plaintiff's case. A written summary of the hearing was prepared. Subsequent to the presentations of factual evidence and argument, the board of officers found by a vote of 3 to 0 that plaintiff had admitted that he is bisexual and, based on that finding, recommended plaintiff's discharge from the Naval Reserves under honorable conditions. The board's recommendation was referred to the Secretary of the Navy by memorandum dated June 1, 1984.

7. On March 2, 1984, plaintiff filed an application for correction of military naval records, seeking "reinstatement in the Naval Reserves". In the application, plaintiff maintained that the board had insufficient evidence upon which to base its finding that plaintiff had stated he was bisexual. On October 3, 1984 plaintiff was informed by memorandum from the Secretary of the Navy that he was honorably discharged from the U.S. Naval Reserves effective June 7, 1984. By letter dated September 4, 1985, plaintiff was informed that his application for correction of records was denied.

8. Plaintiff timely exhausted his administrative remedies by seeking review of his discharge when he filed an Application for Correction of Military Naval Records on March 2, 1984. Thereafter, plaintiff filed suit in federal district court.

9. As the record of hearing the board of officers establishes, the basis for plaintiff's discharge was that he had stated that he was bisexual. The finding was based on certain letters written and received by plaintiff discovered during the search of his civilian employment office at Pomona on August 9, 1982. It was also based on a statement plaintiff made to the Naval Investigative Service (NIS) special agent investigating the discovery of the letters. In an interview with the NIS agent on August 11, 1982, plaintiff stated that he was bisexual.

10. As a defense to this evidence, plaintiff maintained that although he held himself out as a bisexual, had solicited sexual encounters with both men and women in the letters, and had indicated in the letters that he had previously performed fellatio with men, he was not actually bisexual. Plaintiff maintained that such writings were mere fantasy. The board did not accept plaintiff's explanation as credible. Plaintiff also maintained that he did not state to the NIS agent that he was bisexual. The board did not find plaintiff credible on this point and chose to believe the NIS agents version of the interview.

II

CONCLUSIONS OF LAW

11. The applicable Department of the Navy regulations, Secretary of the Navy Instructions ("SECNAVINST") 1900.9D (id. at

33-35) provide:

> 4. Policy. Homosexuality is incompatible with military services . . . . The presence in the military environment of persons who engage in homosexual conduct or who, by their statements demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission . . . . Such persons shall normally be separated from the naval service in accordance with this instruction.
>
> 5. Definitions.
>
> b. Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.
>
> 7. Bases For Administrative Separation.
>
> b. A member shall be separated under this instruction if, but only if, one or more of the following three approved findings is made: . . .
>
> (2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not homosexual or bisexual.

12. Plaintiff's prayer for relief seeks reinstatement "with all rights and benefits to which he is entitled." This prayer

-13-

necessarily implies a claim for back wages and other financial benefits. The defendants named in this cause of action are the Department of the Navy and the Secretary of the Navy, sued in his official capacity.

13. In general, the United States as a sovereign is immune from suit unless it consents to be sued. The terms of the consent to be sued define the jurisdiction of the court entertaining the suit. United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed.2d 1058 (1976). Unless sovereign immunity has been waived, it bars equitable and legal remedies against the United States. Beller v. Middendorf, 632 F.2d 788, 796 (9th Cir. 1980).

14. The Administrative Procedures Act (APA), 5 U.S.C. § 702, waives sovereign immunity only for nonmonetary relief for constitutional violations, it does not provide a basis for an award of monetary damages for constitutional violations. Id. at 797-798. The Federal Tort Claims Act does not waive sovereign immunity for constitutional torts brought against the United States either. Arnsberg v. United States, 757 F.2d 971, 980 cert. denied 475 U.S. 1010, 106 S.Ct. 1183, 89 L.Ed.2d 307 (1986).

15. Plaintiff is limited only to declaratory relief and reinstatement should the court find his rights were violated.

FIRST AMENDMENT RIGHTS

16. Plaintiff was discharged from the Navy because he admitted to being a bisexual in letters to third parties and admitted being bisexual to an NIS agent. These admissions are not entitled to First Amendment protection.

17. In evaluating the First Amendment rights of public employees, the threshold inquiry is whether the statements at

issue were a matter of public concern. Allen v. Scribrer, 812 F.2d 426, 430 (9th Cir. 1987) as amended 828 F.2d 1445 (9th Cir. 1987). If the matter is not a matter of public concern "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Connick v. Myers, 461, U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708, 719 (1983). "Because [plaintiff's] statements were made 'for personal reasons and not to inform the public of matters of general concern' they are not entitled to First Amendment protection. Woodward v. United States, 871 F.2d 1068, 1071 n.2 (Fed.Cir. 1989) quoting Fiollo v. United States Department of Justice, 795 F.2d 1544, 1550 (Fed. Cir. 1986).

18. Plaintiff's statements that he was a bisexual were made in two contexts, neither of which can be considered a "matter of public concern". The letters seeking sexual encounters were private affairs. The statement he made to the NIS agent involved only the investigation of those private affairs. The statements were not of general public concern but were matters personal to plaintiff. See also Johnson v. Orr, 617 F.Supp. 170, (E.D. Cal. 1985) (holding that self assertion of homosexuality is an admission of fact that can serve as a basis for discharge.)

19. Plaintiff was not discharged for exercising his freedom of speech. He was discharged because he was an admitted bisexual. Had the Navy determined that plaintiff was not, in fact, bisexual despite his admissions, he would not have been subject to discharge under Navy regulations despite those admissions (See SECNAVINST 1900.9D ¶ 7(b)(2)). The essence of the

24. Neither the Navy regulations nor the practices of the Navy created a reasonable expectation of continued employment once a person is determined to be an admitted homosexual. There is no basis for inferring any expectation of continued service sufficient to constitute a constitutional property interest. Middendorf, Id.

25. The Navy's action had not deprived plaintiff of a liberty interest in violation of the Fifth Amendment. Id. at 806. There is no allegation or evidence that plaintiff's discharge from the Navy prevented him from retaining or obtaining civilian employment or seriously damaged his standing and association in the community constituting a deprivation of a liberty interest.

26. Even if there were, plaintiff was accorded a hearing which had adequate safeguards to ensure procedural due process. Id. at 806. He was offered appointment of military counsel, he had the opportunity to present witnesses and cross examine witnesses testifying against him, he had advance notice of the charges against him, and had a variety of other rights equivalent to those afforded federal civil litigants. Therefore, even if he had a liberty interest, it was sufficiently protected at the hearing before the board.

27. Fifth Amendment equal protection claims are treated the same as claims under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 1228 n.2, 43 L.Ed.2d 514 (1975). In an equal protection case, the initial inquiry is what level of judicial scrutiny is appropriate. "The general rule is that legislation is presumed to be valid and will

be sustained if the classification drawn is rationally related to a legitimate governmental interest" (low-level scrutiny). Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). The rule gives way when a statute or regulation is based on "suspect" classifications. If so, the regulations are subjected to strict scrutiny (high level scrutiny), and are constitutional only if narrowly tailored to serve a compelling state interest. Id. at 440. Legislation based on quasi-suspect classification are subjected to intermediate or "heightened" level of review, and will be sustained only if the classification is "substantially related to an important governmental interest." Id. at 441.

28. In Rich v. Secretary of The Army, 735 F.2d 1220 (10th Cir. 1984), plaintiff challenged the Army's policy of excluding homosexuals as a violation of the equal protection clause, maintaining that homosexuality is an immutable characteristic requiring strict scrutiny review. The court rejected the argument stating "[a] classification based on one's choice of sexual partners is not suspect," citing Hatheway v. Secretary of Army, 641 F.2d 1376, 1382 (9th Cir. 1981) cert. denied, 454 U.S. 864, 102 S.Ct. 324, 70 L.Ed.2d 164 (1981); DeSantis v. Pacific Telephone & Telegraph, 608 F.2d 327 (9th Cir. 1979). In Hatheway the Ninth Circuit applied mid-level scrutiny in concluding that the Army's policy of selectively prosecuting sodomy cases involving homosexuals only and concluded that the policy was constitutionally permissible.

29. Since Hatheway was decided, the Supreme Court in Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1987)

decided if a Georgia statute criminalizing sodomy between consenting adults violated the substantive due process rights of those charged under the statute. The Court upheld the statute, holding that the Constitution does not confer a fundamental right to homosexuals to engage in sodomy. Although Hardwick did not expressly consider whether homosexuals were a suspect class, the underlying rationale and logic of the decision suggest that homosexuals would not be treated as a suspect class:

> The court's reasoning in Hardwick . . . forecloses appellant's efforts to gain suspect class status for practicing homosexuals. It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving strict scrutiny protection under the equal protection clause . . . . After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

30. A critical criteria used to identify suspect classes is the existence of immutable characteristics such as race. See e.g. Loving v. Virginia, 388 U.S. 1, 11 (1967) (race) or Korematsu v. United States, 323 U.S. 214, 214 (1984) (national origin). This characteristic does not apply to homosexuals.

> Members of recognized suspect or quasi-suspect classes . . . exhibit immutable characteristics, whereas homosexuality is

behavioral in nature . . . . The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups.

Woodward v. United States, 871 F.2d at 1076. For the reasons cited in Woodward, plaintiff's claim of violation of equal protection should be rejected.

NINTH AMENDMENT RIGHTS

31. "The Ninth Amendment has never been recognized as independently securing any constitutional right for purposes of pursing a civil rights claim." Standberg v. City of Helena, 791 F.2d 744, 748 (9th Cir. 1986). Where plaintiff has failed to identify any other constitutional amendment or fundamental right guaranteed by the constitution which defendants have abridged, he cannot maintain a claim under the Ninth Amendment. Schertz v. Waupaca County, 683 F.Supp. 1551, 1561 (E.D. Wis. 1988). In fact the Supreme Court in Bowers v. Hardwick, supra at 190 rejected the notion that there is a fundamental right to privacy in homosexual conduct Because no other constitutional right has been violated in plaintiff's case, the Ninth Amendment claim must also fall.

NON-CONSTITUTIONAL CLAIMS

32. The remainder of plaintiff's allegations are that his discharge was arbitrary, capricious and an abuse of discretion. These are non-constitutional claims. Such claims are not reviewable. The Supreme Court has frequently cautioned that encroachment by civilian courts into military life must necessarily be limited because "judges are not given the task of running the Army." Orloff v. Willoughby, 345 U.S. 83, 93, 73

S.Ct. 534, 540, 97 L.Ed.2d 842 (1953). In Wallace v. Chappell, 661 F.2d 729, 733 (9th Cir. 1981) the court recognized that this kind of litigation is potentially disruptive to military operations and creates difficulty in military discipline. Id. at 732.

33. Even if the plaintiff's non-constitutional claims relating to his discharge were reviewable, the discharge withstands judicial scrutiny. There is substantial evidence to support the board's finding that plaintiff had admitted he was bisexual. See e.g. AR at 60, 62, 74, 76, 97. Plaintiff's only defense to this evidence was that his writings were mere fantasy. The board simply did not believe the plaintiff's explanation.

34. The APA, under which plaintiff seeks review, does not permit trial de novo. United States v. Consolidated Mines and Smelting Company, 455 F.2d 432 (9th Cir. 1971). In determining credibility issues, the reviewing authority should not substitute is own judgment for that of the fact-finder. Fairbank v. Hardin, 429 F.2d 264, 268 (9th Cir. 1970). Due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. N.L.R.B. v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965).

35. Given the overwhelming weight of the evidence, it can not be said that the board's decision to disbelieve plaintiff was arbitrary, capricious or not supported by substantial evidence.

36. There are no genuine issues of material fact, and defendants are entitled to judgment as a matter of law.

DATED: ~~September~~ November 13, 1989.

A. ANDREW HAUK

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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Assistant United States Attorney
Chief, Civil Division

DONNA R. EIDE
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APPENDIX C Opinion of the Ninth Circuit
Court of Appeals filed 30 July 1987

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD NEAL SCHOWENGERDT, *Plaintiff-Appellant,* v. GENERAL DYNAMICS CORPORATION; C.W. KESSEL; K.D. TILLOTSON; CARL W. JENSEN; RICHARD S. DAY; and JOHN LEHMAN, SECRETARY OF THE NAVY, *Defendants-Appellees.*	No. 84-6231 D.C. No. CV 83-8007-AAH OPINION

Argued and Submitted
February 6, 1986—Pasadena, California

Filed July 30, 1987

Before: Betty B. Fletcher, Dorothy W. Nelson and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Fletcher

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding

SUMMARY

Civil Rights

Appeal from the dismissal of a complaint. Affirmed in part, reversed in part and remanded for further proceedings.

Appellant Schowengerdt (Schowengerdt) was employed by the Department of the Navy in a Civil Service engineering position at a Naval Industrial Reserve plant in Pomona, California, and was also in the Naval Reserve. Appellee General Dynamics provided security services for the plant and employed appellee Kessel as a Security Investigator. The complaint alleges Kessel acted on behalf of and as an agent for the Navy in entering Schowengerdt's locked office, searching his locked desk, and seizing personal photographs and correspondence that involved sexual matters. The next day appellee Tillotson, acting naval plant representative, and appellee Jensen, special agent for the Naval Investigative Service, joined in a second warrantless search, later informing the Postal Service that Schowengerdt was receiving and sending pornographic materials through the mails. They also informed the Naval Reserve that Schowengerdt was involved in homosexual activities.

During proceedings which led to his discharge, the Secretary of the Navy sent a letter to appellant's home concerning the discharge, which family members intercepted and read. Five months after the search, Schowengerdt resigned from the Civil Service and took a job in private industry, but his security clearance was withheld for 16 months, allegedly because of an adverse comment by appellee Day. Schowengerdt's complaint alleges these acts were an abuse of authority by the defendants and that the search was not authorized by government regulations. Concluding Schowengerdt had no reasonable expectation of privacy in his desk, the district court granted motions to dismiss for failure to state a claim.

[1] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 288 (1971), allows victims of a constitutional violation by a federal agent to recover damages despite the absence of any statute conferring such a right, [2] but a *Bivens* cause of action may be defeated if special factors counsel hesitation in the absence of affirmative action by Congress. [3] The district

court ruled that Schowengerdt could not have had a reasonable expectation of privacy in his desk primarily because the desk was the property of his employer, but fourth amendment privacy interests do not turn on property interests, but depend on the existence of a reasonable expectation of freedom from governmental intrusion. [4] In *O'Conner v. Ortega*, 107 S.Ct. 1492 (1987), the Supreme Court was unanimous in finding that a state hospital doctor on administrative leave had a reasonable expectation of privacy in his desk and filing cabinets. [5] Although a majority of the *Ortega* court did not reach consensus as to what determines whether an employee's expectation of privacy is reasonable, sufficient guidance was provided to allow a conclusion that in this case the district court erred in finding that under no circumstances could Schowengerdt have a reasonable expectation of privacy in his desk and credenza.

[6] *U.S. v. Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975), upheld the search of a postal worker's locker based on published regulations making it clear that the lockers were subject to search, [7] but it is concluded that Schowengerdt would enjoy a reasonable expectation of privacy in areas given over to his exclusive use unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes. [8] On remand Schowengerdt and the government should be given the opportunity to develop facts relevant to the existence and scope of policies and practices or regulations relating to searches at the facility. [9] Because Schowengerdt had a constitutional right to be free from unnecessary, overbroad, or unregulated employer investigations into his sexual practices, the search of his desk and credenza to find and seize materials relating to such matters would be reasonable only if relevant to his job as a naval engineer, and the scope of the inquiry must be no broader than necessary. [10] The "private" defendants' argument that a *Bivens* action is not available against them since they are not

government employees (though they may be federal actors) is rejected.

[11] Private corporations can be liable for constitutional violations, [12] provided the defendant engaged in federal action. [13] Whether or not the private defendants action was a federal action is a question of fact to be determined on remand. [14] Nor can it be argued that Congress has acted to regulate the aspect of government/employee relations at issue in this case, raising a special factor against consideration of a *Bivens* action.

[15] Schowengerdt's claims under the Posse Comitatus Act fail because the Act is inapplicable to Navy involvement. [16] and no cause of action is stated under 18 U.S.C. § 1702, which protects correspondence in the U.S. mails, because the law protects only letters that have not been received. [17] Although the claim under 18 U.S.C. § 2510-2520, concerning interception of oral and wire communications, is defective because Schowengerdt has alleged no such interceptions, this pleading defect could be cured by amendment. [18] No claim is stated under 42 U.S.C. § 1985(3) because racial or other class-based animus is alleged, and membership in a class based on sexual preference does not support a § 1985 action. [19] Mailing the letter to Schowengerdt's home did not violate the Privacy Act because it was not a "disclosure" within the meaning of the act, and the letter was directed to an employee concerning his employment status, and was thus a routine use authorized under the Act. [20] The claim for injunctive relief from military discharge is ripe for review by the district court if Schowengerdt has exhausted his administrative remedies.

COUNSEL

Carl B. Pearlston, Jr., Torrence, California, for the plaintiff-appellant.

Stephen E. O'Neal and Nancy P. McClelland, Los Angeles, California, for the defendant-appellee.

OPINION

FLETCHER, Circuit Judge:

Schowengerdt appeals the dismissal of his complaint against General Dynamics, a General Dynamics security employee, the Secretary of the Navy, and various Navy personnel for failure to state a claim. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Schowengerdt seeks declaratory and injunctive relief and money damages against General Dynamics and C.W. Kessel, a General Dynamics security investigator ("private defendants"), Secretary of the Navy John Lehman and Navy personnel Carl Jensen, K.D. Tillotson, and Richard Day ("federal defendants"). Jurisdiction is invoked under, *inter alia*, 28 U.S.C. § 1331, for claims arising "under the First, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution, Title 18 U.S.C. Sections 1385, 1702, and 2510-20, and Title 42 U.S.C. Section 1985(3)." The complaint specifically alleges violations of Schowengerdt's rights to privacy, to freedom of association and speech, and to freedom from unreasonable searches and seizures. We read it also as alleging a conspiracy among all defendants to violate those rights.[1] In addition, the first cause of action also alleges that defendants violated Privacy Act regulations, while the second and third causes of actions allege pendant state-law invasion-of-privacy and trespass claims against the private defendants.

[1]The complaint reads in part: "Plaintiff alleges that Defendants were motivated to conspiratorial action against Plaintiff because of various past differences . . . ."

Schowengerdt was employed by the Department of the Navy in a Civil Service engineering position at a Naval Industrial Reserve plant in Pomona, California. He was also a Chief Warrant Officer in the Naval Reserve. General Dynamics provided security services for the plant and employed Kessel as a Security Investigator. The complaint alleges Kessel acted on behalf of and as an agent for, the Navy. Tillotson was Executive Officer and Acting Naval Plant Representative at the plant. Carl Jensen was a special agent for the Naval Investigative Service and Richard Day was Chief of Security at a Naval Engineering Station at Port Hueneme, California.

On August 9, 1982, Kessel entered Schowengerdt's locked office, searched his locked desk and credenza, and seized personal photographs and correspondence that involved sexual matters. On the following day, Kessel and Navy employees Tillotson and Jensen conducted a second search and seized similar items. These searches were carried out without a warrant. Schowengerdt contends that they were not authorized by Naval regulations.

Tillotson and Jensen informed the Postal Service that Schowengerdt was receiving and sending pornographic materials through the mails. They also informed the Naval Reserve that Schowengerdt was involved in sodomy and homosexual activities. Following administrative discharge proceedings, and review by the Secretary of the Navy, Schowengerdt was discharged from the Naval Reserve. During the course of the discharge proceedings, Lehman sent a letter by regular mail to Schowengerdt's home, stating that Schowengerdt was being considered for discharge from the Naval Reserve because of homosexual and bisexual activities. The letter was intercepted and read by Schowengerdt's family.

Approximately five months after the search, Schowengerdt resigned from the Civil Service and took a job in private industry. Schowengerdt alleges that an adverse comment

made in a security questionnaire completed by Defendant Day caused his security clearance not to be transferred to his new employer and to be withheld for a period of sixteen months.

The complaint alleges that these acts were an abuse of authority by the defendants and that the search was not authorized by government regulations. It is claimed that the defendants' actions adversely affected Schowengerdt's career, future employment opportunities, reputation and familial harmony, causing him mental anguish, anxiety, insomnia, and emotional distress. The complaint states that "[a]ll Defendants, other than GENERAL DYNAMICS and C.W. KESSEL, are sued in their official governmental capacity."

The private and the federal defendants filed separate motions to dismiss the complaint. The district judge dismissed the constitutional claims because of his finding that Schowengerdt failed to allege facts that established a reasonable expectation of privacy in his desk. The pendant state claims were dismissed for lack of jurisdiction. The district court refused to review Schowengerdt's claim relating to his then pending military discharge because it found that the available administrative remedies had not yet been exhausted. Finally, the court held that Schowengerdt failed to allege facts sufficient to state a claim under 42 U.S.C. § 1985(3); the court did not specifically address Schowengerdt's other statutory claims, but rather simply dismissed all causes of action.

II. STANDARD OF REVIEW

Whether a complaint should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law subject to *de novo* review. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 795 (1986). We restrict our review to the contents of the complaint, accepting the material factual allegations as

true and construing them in the light most favorable to the appellant. *Id.* The test we apply is generous to the plaintiff: dismissal for failure to state a claim is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *quoted in Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 928 (1987).

III. DISCUSSION

A. *Constitutional Claims for Damages*

[1] In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court "established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980). The statutory basis for "*Bivens*" jurisdiction is 28 U.S.C. § 1331.[2] *See Bush v. Lucas*, 462 U.S. 367, 374 (1983); *Butz v. Economou*, 438 U.S. 478, 486 (1978). The Supreme Court has specifically approved *Bivens* actions for violations of the Fourth Amendment, *Bivens*, 403 U.S. at 397, the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 248-49 (1979), and the Eighth Amendment, *Carlson*, 446 U.S. at 19. This court has extended the reach of *Bivens* to alleged violations of the First Amendment. *Gibson*, 781 F.2d at 1342.

[2] A *Bivens* cause of action may be defeated if "special factors counsel[] hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 396; *Carlson*, 446 U.S. at 18, or if "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-19 (citing *Bivens*, 403 U.S. at 397).

[2] 28 U.S.C. § 1331 gives the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Schowengerdt's complaint invokes 28 U.S.C. § 1331 as the source of district court jurisdiction and alleges constitutional violations by federal agents.[3] We examine it to determine whether Schowengerdt might be able to prove under the alle-

[3] The "private" defendants, Kessel and General Dynamics, argue that Schowengerdt's complaint is deficient because it fails to plead that they were federal officers acting under federal law. We find that Schowengerdt's pleading is adequate. First, it states that Kessel was an "agent" for the Navy and that General Dynamics "provided security services on behalf of" the Navy. Thus, the complaint sufficiently alleges that Kessel and General Dynamics were federal actors. Second, the complaint alleges that Kessel jointly participated with the federal defendants in searching Schowengerdt's office and seizing his property. Such joint participation "would establish both state action and action under color of state law." *Howerton v. Gabica*, 708 F.2d 380, 382 n.5 (9th Cir. 1983). The term "state" as used here encompasses federal action taken under the color of federal law. *See Ginn v. Mathews*, 533 F.2d 477, 480 n.4 (9th Cir. 1976); *Reuber v. United States*, 750 F.2d 1039, 1057 (D.C. Cir. 1984); *Dooiyns v. E-Systems, Inc.*, 667 F.2d 1219, 1220 n.1 (5th Cir. 1982).

Schowengerdt's complaint with respect to the federal defendants is more problematic. He asserts that he is suing them in their "official governmental capacity." Typically actions against federal officers in their official capacity are, in reality, suits against the United States and as such are barred by the doctrine of sovereign immunity. *Chilicky v. Schweiker*, 796 F.2d 1131, 1137 n.7 (9th Cir. 1986); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458-59 (9th Cir. 1985). The major thrust of Schowengerdt's claim, however, is that federal officials committed unconstitutional acts. As we recently noted, "when a federal official commits an unconstitutional act, he is necessarily acting outside his official capacity." *United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9th Cir. 1986)(amending 794 F.2d 1402)(citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)). Where constitutional violations are alleged, the doctrine of sovereign immunity may not be invoked, but the claim is against the official in his individual, not his official capacity. *Yakima Tribal Court*, 806 F.2d at 859. Thus, in essence Schowengerdt's complaint is self-contradictory; it ostensibly sues officials in their official capacity for acts which, by definition, are actions by officials *outside* their official capacity. On remand, Schowengerdt should be given an opportunity to amend his complaint so as to remove this technical defect and conform his pleadings to the substance of his allegations.

gations of his complaint some set of facts entitling him to relief, having in mind that his claim might be defeated by the existence of "special factors" or by an alternative remedy explicitly provided by Congress.

We take the district court's conclusion that Schowengerdt had no reasonable expectation of privacy in his desk as a determination by the court that it was factually impossible for Schowengerdt to prove the existence of a constitutional violation. We examine first whether facts could be proved that support Schowengerdt's claim that his constitutional rights were violated and, second, whether, in this case, there exist special factors that nonetheless would preclude recovery under *Bivens*.[4]

1. *The Existence of Constitutional Violations*

[3] The district court ruled that Schowengerdt could not have had a reasonable expectation of privacy in his desk primarily because the desk was the property of his employer.[5] Fourth Amendment privacy interests do not, however, turn on property interests. That notion was put to rest by the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967). In holding that protection against unreasonable searches and seizures guaranteed by the Fourth Amendment depends upon

[4]We note that Congress has not "provided an alternate remedy [for Schowengerdt's alleged injuries] which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

[5]The district court found that the complaint failed to allege, and that Schowengerdt would not be able to allege, "any claims against any and all of the named defendants for their actions in removing certain materials from a government owned desk in a government office. [Schowengerdt] has failed to allege or establish that he had any reasonable expectation of privacy in the desk in relation to the possibility of his supervisors entering the desk as part of an investigation into his job performance." *Schowengerdt v. General Dynamics*, No. CV 83-8007-AAH at 2 (C.D. Cal. July 20, 1984) (unpublished order and judgment of dismissal).

the existence of a "reasonable expectation of freedom from governmental intrusion," the Court rejected the contention that those who seek to invoke Fourth Amendment protections must have a property right in the area searched. *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (citing *Katz*, 389 U.S. at 352).

[4] The reasonableness of a government employee's expectation of privacy in his workplace was recently explored by the Supreme Court in *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987). In *Ortega*, the desk and files of Doctor Ortega, a state employee who was on administrative leave during an investigation into charges of work-related improprieties, were searched by a hospital investigatory team; during the course of the search, several personal items were seized. *Id.* at 1495-96. Ortega brought an action under 42 U.S.C. § 1983 against several hospital administrators alleging that the search violated the Fourth Amendment. *Id.* at 1496. This court, reversing a grant of summary judgment to the government supervisors, held that Ortega's expectation of privacy was reasonable and that the search and seizure violated his Fourth Amendment rights. *Ortega v. O'Connor*, 764 F.2d 703 (9th Cir. 1985), *rev'd*, 107 S. Ct. 1492 (1987). A majority of the Supreme Court found that it was error for this court to reach the issue of whether the search in *Ortega* violated the Fourth Amendment, *see* 107 S. Ct. at 1504 (plurality opinion); *id.* at 1506 (Scalia, J., concurring in the judgment), but the Court was unanimous in finding that Ortega had a reasonable expectation of privacy in his desk and filing cabinets. *See id.* at 1499 (plurality opinion); *id.* at 1506 (Scalia, J., concurring in the judgment); *id* at 1510 (Blackmun, J., dissenting).

[5] Although a majority of the *Ortega* Court did not reach consensus as to what determines whether an employee's expectation of privacy is reasonable, sufficient guidance was provided to allow us to conclude that, in this case, the district court erred in finding that under no circumstances could Schowengerdt have a reasonable expectation of privacy in his

desk and credenza. All members of the *Ortega* Court agreed that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government."[6] *Id.* at 1498 (plurality opinion); *id.* at 1508 (Blackmun, J., dissenting) (quoting plurality opinion); *id.* at 1505 (Scalia, J., concurring in the judgment)("There is no reason why this determination that a legitimate expectation of privacy exists should be affected by the fact that the government, rather than a private entity, is the employer."). Eight justices agreed that some expectations of privacy held by employees may be unreasonable due to the "operational realities of the workplace."[7] *Id.* at 1498 (plurality opinion); *id.* at 1508 (Blackmun, J., dissenting). Justice O'Connor, writing for four justices and announcing the judgment of the court, thought that the fact that an office is open to fellow employees is an "operational reality" that could defeat an expectation of privacy in that office. *See id.* at 1498 (plurality opinion). Five justices, however, disagreed and found that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." *Id.* at 1505 (Scalia, J., concurring in the judgment); *id.* at 1509 (Blackmun, J., dissenting)(quoting Justice Scalia). Justice O'Connor also opined that "[p]ublic employees' expectations of privacy

[6]The *Ortega* Court rejected the Solicitor General's and the hospital administrators' argument that "public employees can never have a reasonable expectation of privacy in their place of work." 107 S. Ct. at 1498 (plurality opinion).

[7]Justice Scalia disagreed that the fact that the searcher is also the employer is relevant in determining whether an expectation of privacy is reasonable. 107 S. Ct. at 1505. He would hold "that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by the Fourth Amendment .... [unless] the office is subject to unrestricted public access, so that it is 'expose[d] to the public' and therefore 'not a subject of Fourth Amendment protection.' " 107 S. Ct. at 1505-06 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). To Justice Scalia, the status of the searcher as employer becomes relevant in determining whether, given a reasonable expectation of privacy, a search is nevertheless reasonable. *Id.* at 1506.

... may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 1498 (plurality opinion). The five justices who did not join in Justice O'Connor's opinion neither embraced nor rejected this statement. Pre-*Ortega* law, however, in this and other circuits, supports it.

[6] In *United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975), this Court upheld the search of a postal worker's locker by postal inspectors after the worker had been observed taking C.O.D. packages from her work station to the women's locker room. Because published regulations made clear that the lockers were subject to search and Bunkers' union also retained the right to conduct locker searches upon suspicion of criminal activity, the court found "an effective relinquishment of Bunkers' Fourth Amendment immunity in her work connected use of the locker." *Id.* at 1221.

The *Bunkers* court relied on search-authorizing regulations in its case to distinguish an earlier case, *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951). *Bunkers*, 521 F.2d at 1220. In *Blok*, the court found the search of a government employee's desk unreasonable. The employee had been arrested on suspicion of petty larceny, and her supervisors had consented to a search of her desk. The court found that Blok's exclusive use of the desk made search for evidence of petty larceny unreasonable; her supervisors did not have the authority to consent to the search because they, themselves, were not empowered to conduct the search. Although the *Blok* court thought that superiors might reasonably search for "official property needed for official use," 188 F.2d at 1021, where government property was not the object of the search, a different rule applied:

> *In the absence of a valid regulation* to the contrary appellee was entitled to, and did, keep private property of a personal sort in her desk. Her superiors

> could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office.

Id. (emphasis added).

The Third Circuit has relied on the reasoning of *Bunkers* to find workplace searches illegal under the Fourth Amendment. In *United States v. Speights*, 557 F.2d 362 (3d Cir. 1977), a police sergeant broke into and searched a police officer's locker. Noting that *Bunkers* and other relevant cases "all relied on specific regulations and practices in finding that an expectation of privacy was not reasonable," *id.* at 365, the *Speights* court focused on the absence of police regulations or practices that would have "alert[ed] an officer to expect unconsented locker searches." *Id.* Because the police department had not demonstrated the existence of a practice of opening lockers secured with private locks, Speights' expectation of privacy in his locker was reasonable. *Id.* at 364. Similarly, in *Gillard v. Schmidt*, 579 F.2d 825, 828 (3d Cir. 1978), the Third Circuit found that "a [school] guidance counselor, charged with maintaining sensitive student records, in the absence of an accepted practice or regulation to the contrary, enjoys a reasonable expectation of privacy in his school desk."

[7] We conclude that Schowengerdt would enjoy a reasonable expectation of privacy in areas given over to his exclusive use, unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes.[6]

[6] A majority of the *Ortega* court agreed that under some circumstances a government office is "so open . . . to the public that no expectation of privacy is reasonable." 107 S. Ct. 1498 (plurality opinion); *id* at 1506 (Scalia, J., concurring in the judgment)(stating that where an "office is subject to unrestricted public access, so that it is 'expose[d] to the public' [it is] 'not a subject of Fourth Amendment protection' "(quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). Because Schowengerdt's office was located in a security facility, it was obviously not so open to the public as to render his expectation of privacy unreasonable on this basis.

[8] Schowengerdt alleged that there were no regulations providing for searches of employees' office furnishings. It was therefore error for the district court to dismiss his complaint based on a finding that Schowengerdt could have no reasonable expectation of privacy in his desk. On remand both Schowengerdt and the government should be given the opportunity to develop facts relevant to the existence and scope of policies and practices or regulations relating to searches at the Naval facility.

If it is found that Schowengerdt had a reasonable expectation of privacy, under *Ortega* a warrantless search of his office nevertheless could be legal if the search was both work-related—that is, carried out to retrieve the employer's property or to investigate work-related misconduct—and "reasonable" under the circumstances. *Ortega*, 107 S. Ct. at 1500-02 (plurality opinion); *id.* at 1506 (Scalia, J., concurring in the judgment). In order to be "reasonable,"

> both the inception and the scope of the intrusion must be reasonable[.]
>
> . . .
>
> Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. . . . The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]."

Id. at 1502-03 (plurality opinion)(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 342 (1985)).

Schowengerdt alleges that his office was searched, not to retrieve government property, but rather to investigate his sexual activities. It is unclear whether information concerning these matters could be a legitimate concern of his employer. We note that "*Thorne* [*v. El Segundo* (*Thorne I*), 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984),] established in this circuit that the Constitution prohibits unregulated, unrestrained employer inquiries into personal sexual matters that have no bearing on job performance." *Thorne v. El Segundo* (*Thorne II*), 802 F.2d 1131, 1139 (9th Cir. 1986). In *Thorne I*, we held that the government employer, a city police department, violated Thorne's constitutionally protected right to privacy when it required her to reveal personal sexual information. *Id.* at 468-70. *Thorne I* narrowly circumscribes constitutionally permissible inquiry:

> [T]he [government] must show that its inquiry into appellant's sex life was justified by the legitimate interests of the [government employer], that the inquiry was narrowly tailored to meet those legitimate interests, and that the [employer's] use of the information . . . was proper in light of the [government's] interests.

Id. at 469.

[9] Because Schowengerdt had a constitutional right to be free from unnecessary, overbroad, or unregulated employer investigations into his sexual practices, the search of his desk and credenza to find and seize materials relating to such matters would be reasonable only if relevant to his job as a naval engineer.[9] Furthermore, the scope of the inquiry must be no broader than necessary. *Ortega*, 107 S. Ct. at 1502-03. If less intrusive methods were feasible,[10] or if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes,[11] such as its interest in security, the search would be unreasonable and Schowengerdt's Fourth Amendment rights and right to privacy would have been violated.

[9] *See also United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973) ("We believe this element of work-relatedness is where the trespass line must be drawn."); *United States v. Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951) (superiors could not search desk for items "that did not belong to the government and had no connection with the work of the office"). *Cf. United States v. Bunkers*, 521 F.2d 1217, 1220 n.1 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975)("We express no view . . . upon the reasonableness of a [locker-search] for the fruits of a crime not work connected").

Both the work-relatedness of the searches and seizures that could obviate the warrant requirement and the reasonableness of the searches under the circumstances are factual matters that must be developed on remand. Because it does not appear "beyond doubt that [Schowengerdt] can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), the district court erred in dismissing the complaint for failure to state a claim. If, on remand, Schowengerdt is able to establish his reasonable expectation of privacy, and demonstrate that either a warrant was required or that the searches or seizures were unreasonable in scope, he may pursue his claim for damages based on violations of his constitutional right to be free from unwarranted searches and seizures, *Bivens*, 403 U.S. at 397; his right to privacy, *see Kotarski v. Cooper*, 799 F.2d 1342, 1345 (9th Cir. 1986); *Slayton v. Willingham*, 726 F.2d 631, 635 (10th Cir. 1984)(per curiam); *Thorne I*, 726 F.2d at 471; and his First Amendment right to freedom of association, *see id.*[12]

[10] It might be less objectionable, for example, to question an employee directly than it would be to search his private papers without his knowledge.

[11] Schowengerdt alleges that the initial search of his desk was undertaken for the express purpose of finding the items relating to his sexual activities. If in fact those items were discovered, for example, during a routine administrative search for classified documents pursuant to government policy, we note that seizure of those items and the second search and seizure would still have to satisfy the *Ortega* and *Thorne* limitations.

[12] The district court did not reach the merits of these claims —beyond finding that Schowengerdt had no reasonable expectation of privacy— and we express no opinion on the merits of Schowengerdt's claims here. *See Kotarski*, 799 F.2d at 1345 n.4.

2. *Special Factors Counselling Hesitation*

Private Status as a Special Factor

[10] The "private" defendants, Kessel and General Dynamics, argue that a *Bivens* remedy is not available against them since they are not government employees even though they may be "federal actors." We disagree that the private status of a federal actor is a "special factor" that would preclude a *Bivens* action.

[11] In *Ginn v. Mathews*, 533 F.2d 477 (9th Cir. 1976), we held that a private corporation could be liable for constitutional violations. In *Ginn*, terminated and demoted employees of the Economic Opportunity Council of San Francisco (EOC), a private corporation that operated the federal Head-start Program in San Francisco, sought damages from their employer for violations of their First, Fifth, and Fourteenth Amendment rights. District court jurisdiction was invoked under, *inter alia*, 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The plaintiffs in *Ginn* claimed that EOC was "a de facto arm of the state and federal governments and its action constituted 'state action' and thus was subject to federal constitutional limitations." *Ginn*, 533 F.2d at 477-78.

Plaintiffs brought both a section 1983 action (for constitutional violations under color of state law) and a *Bivens* action (for constitutional violations under color of federal law).[13]

[13]Although the *Ginn* court did not use the words, "*Bivens* action" the court made clear that it was "consider[ing] the question of "state" action in its broad sense as involving both state and federal participation." *Id.* at 480 n.4. The *Ginn* plaintiffs, invoking jurisdiction under section 1331, sought damages for violations of their constitutional rights by federal actors. Such an action is, by definition, a *Bivens* action.

The fact that the *Ginn* opinion did not expressly refer to the case as a *Bivens* action seems to have resulted in its being overlooked on the issue of private-party liability under *Bivens*. *See, e.g., Fonda v. Gray*, 707 F.2d 435, 437 (9th Cir. 1983)(stating that "[w]e are aware of no case . . . which has decided that private parties may be liable in a *Bivens* action," but "assum[ing], without deciding, that private parties may be liable . . . under principles similar to those developed under 42 U.S.C. § 1983"); *Reuber v. United States*, 750 F.2d 1039, 1055 n.21 (D.C. Cir. 1984)(citing cases that have reached or discussed private parties under *Bivens* and omitting *Ginn*). Despite this neglect, *Ginn* represents the law in this circuit.

One of the issues on appeal from dismissal of the employee's claims was "whether the district court erred in ruling that it lacked subject matter jurisdiction because defendant EOC was a private corporation and therefore not subject to the due process clauses of the Fifth and Fourteenth Amendments."[14] *Id.* at 478. The *Ginn* court, fully cognizant of EOC's argument based on its status as a private party, reversed the district court, finding that the employees had stated a claim upon which relief could be granted.[15] *Id.* at 481.

[12] Thus, *Ginn* established in this circuit that the private status of the defendant will not serve to defeat a *Bivens* claim, provided that the defendant engaged in federal action. Other circuits are in accord. A divided panel of the D.C. Circuit recently held that "private status . . .[,] even if deemed a special factor, is not alone sufficient to counsel hesitation in implying a damages remedy when the private party defendants jointly participate with the government to a sufficient extent to be characterized as federal actors . . . ." *Reuber v. United States*, 750 F.2d 1039, 1058 (D.C. Cir. 1984)(opinion

[14]Even if *Bivens* claims did not lie against private parties, dismissal for lack of *subject-matter* jurisdiction would be improper. *See Reuber*, 750 F.2d at 1053-54. The proper form of dismissal would be for failure to state a claim upon which relief may be granted. *See id.* at 1054. Although the district court in *Ginn* apparently dismissed for lack of subject-matter jurisdiction, our holding was that "the complaint states a claim upon which relief may be granted," *Ginn*, 533 F.2d at 481, and thus the decision is not limited to the issue of subject-matter jurisdiction.

[15]The second issue in *Ginn* was whether the EOC's activities constituted "state" action—referring to both state and federal action—and the court concluded that they did. *Ginn*, 553 F.2d at 481.

of Wald, J.); *id* at 1063 (Bork, J., concurring in part)(stating that "a private person whose conduct is allegedly instigated and directed by federal officers should be treated as a federal agent" and "be subject to *Bivens* liability"). The Fifth and Sixth Circuits are in accord. *See Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982); *Yiamouyiannis v. Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir. 1975)(per curiam).[16]

[13] A second aspect of the private defendants contention is that their action was not "federal action." The existence of governmental action is a question of fact. *See Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983). Because, at this stage of the case, we must accept the plaintiff's factual allegations as true, we do not look beyond the complaint.

[16]The First Circuit, in *Fletcher v. Rhode Island Hosp. Trust Bank*, 496 F.2d 927, 932 n.8 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974) found, without explanation, that there is no cause of action against private parties acting under color of federal law. However, in a subsequent case the First Circuit analyzed a constitutional claim against a private corporation alleged to be a federal actor and did not rely on *Fletcher*; rather the court seemed to assume that a cause of action would lie if the private corporation were in fact a federal actor. *See Gerena v. Puerto Rico Legal Servs., Inc.*, 697 F.2d 447, 449 (1st Cir. 1983). The *Gerena* court found that the defendants were not federal actors and held that the plaintiff's complaint had been properly dismissed on that basis. *Id.* at 452.

In *Wagner v. Metropolitan Nashville Airport Auth.*, 772 F.2d 227 (6th Cir. 1985) the district court concluded that the plaintiff's complaint was insufficient to raise a *Bivens* claim because it failed to allege that the defendants were federal agents. In affirming the district court's decision, the Sixth Circuit stated that the "failure to allege that defendant ... was a federal *employee* renders the pleading insufficient under *Bivens*." *Id.* at 230 (emphasis added). If the *Wagner* court intended to limit *Bivens* liability to federal employees, it is in conflict with the Sixth Circuit's earlier decision in *Yiamouyiannis*. Whatever the *Wagner* majority's intent, we agree with Judge Martin's concurring opinion, in which he stated: "I do not believe that Wagner had to allege that Myers was a federal employee ... [He] only had to allege that Myers was a federal agent .... Because Wagner failed to allege that Myers was a federal agent or federal employee, this distinction does not affect the result in this case." *Id.* at 231 n.1 (Martin, J., concurring).

Schowengerdt's complaint alleges facts that, if true, support a finding of government action,[17] but the final determination

[17]Many tests or factors have been articulated for use in determining the existence of sufficient state action. *See Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983)(listing tests and citing cases). At least two of these seem applicable. First, Schowengerdt alleges that the second search of his office was carried out by Kessel and two federal employees. Under the "joint action" test, a private party is acting under color of state (or federal) law if "he is a willful participant in joint action with the [government] or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Howerton*, 708 F.2d at 383. "[W]hen the claim is that the private parties have jointly participated with a [government] official, ordinarily proof of the joint participation would establish both state action and action under color of state law." *Id.* at 383 n.5. In *Howerton* we found that police participation in an illegal eviction transformed the landlord's participation into state action. *See id.* at 384. Under *Howerton*, if the second search was as alleged, Kessel's joint participation would clearly be "state action."

Second, under the "public function" test, the Supreme Court has "found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974); *see also Fidelity Fin. Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 949 (1987). It is alleged that the private defendants provided security for the naval facility. That searches were conducted on behalf of the government "indicate[s] the assumption of a police activity which is clearly a public function." *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1226 (5th Cir. 1982); *see also Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1430 (10th Cir. 1984)(finding that where local police allowed store security guard "to substitute his judgment for that of the police", "[s]uch cooperative activity between the police department and a private party is sufficient to make [the guard] a party acting under color of state law"), *cert. denied* (as to the private defendants), 106 S.Ct. 65 (1985); *Thorne v. City of El Segundo*, 726 F.2d 459, 471 n.11 (9th Cir. 1983)(finding that private person who administered polygraph exams for police department was a state actor because he acted on behalf of and was paid by the government), *cert. denied*, 469 U.S. 979 (1984); *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320, 1322 (9th Cir. 1982)("[A] private towing company acting at the behest of a police officer and pursuant to a statutory scheme designed solely to accomplish the state's purpose of enforcing its traffic laws, acts under color of state law ...."). *Cf. Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344, 1346 (7th Cir. 1986)("A state cannot avoid its obligations under the due process clause by delegating to private persons the authority to deprive people of their property without due process of law.").

of this issue must be made by the district court on remand. *See Reuber*, 750 F.2d at 1054-55. If the district court finds the governmental action requirement satisfied, defendants Kessel and General Dynamics may not rely on their private-party status as a basis for dismissal.

Alternative Regulatory Scheme as a Special Factor

In *Bush v. Lucas*, 462 U.S. 367 (1983), the Supreme Court held that the existence of "an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures —administrative and judicial—by which improper action may be redressed," *id.* at 385, was a "special factor" that made a *Bivens* remedy unavailable to a federal civil servant who had statutory redress for his illegal demotion claim. Schowengerdt, a federal civil servant, can press a *Bivens* action only if the constitutional violations he claims cannot be adequately addressed under the regulatory scheme that governs the relationship between the government and its employees. There are no statutory remedies for illegal searches and seizures carried out by the government against its employees. 5 U.S.C. sections 7513, 7701, and 7703 provide substantial procedural protections for federal employees against whom adverse personnel actions are taken. The covered actions include removal, suspension for more than fourteen days, reduction in grade or pay, and furlough of thirty days or less. 5 U.S.C. § 7512(1)-(5). But, as the Supreme Court noted in *Bush*, a warrantless search directed at an employee is not an "adverse action" covered by the statutory scheme. *See* 462 U.S. at 385 n.28.

[14] In addition, certain personnel practices against federal civil servants are prohibited under 5 U.S.C. section 2302. Procedures for investigating and remedying such practices are provided for in 5 U.S.C. sections 1206, 1207, and 1208. However, section 2302 prohibits only practices respecting the exercise of authority over a "personnel action." 5 U.S.C. § 2302(b). "Personnel actions," for the purposes of section 2302 are specifically listed. They include, for example, appointments, promotions, transfers, and decisions relating to pay. 5 U.S.C. § 2302(a)(2). Schowengerdt complains of none of these. His wrong stems from the search. As the Supreme Court noted in *Bush*, warrantless searches are not "personnel actions" within the statutory scheme. 462 U.S. at 385 n.28. In sum, Congress has not acted to regulate the aspect of government/employee relations at issue in this case, and, thus, the "special factor" present in *Bush* is wholly absent here.

B. *Statutory Claims*

In addition to his constitutional claims, Schowengerdt alleges violations of several federal statutes. With one possible exception, we conclude that the statutory claims were properly dismissed.

1. *18 U.S.C. § 1385*

[15] Schowengerdt claims that the defendants violated 18 U.S.C. § 1385,[18] the Posse Comitatus Act. Because section 1385 by its express terms is inapplicable to Navy involvement in law enforcement, *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir.), *cert. denied*, 107 S.Ct. 142 (1986), Schowengerdt has no cause of action under the statute.

[18]Section 1385 provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

We do not speak to any other statutes that may proscribe Navy involvement, but find only that 18 U.S.C. § 385 does not.

2. *18 U.S.C. § 1702*

[16] Schowengerdt also claims a violation of 18 U.S.C. § 1702.[18] Even if Schowengerdt has a private right of action under the statute,[19] he has not stated a cause of action for its violation. Section 1702 protects only correspondence in the U.S. mails, that has not been received by the addressee. *See Giraud v. United States*, 348 F.2d 820, 822 (9th Cir. 1965), *cert. denied*, 382 U.S. 1015 (1966); *see also United States v. Brown*, 425 F.2d 1172, 1174 (9th Cir. 1970)(per curiam). The letters, that Schowengerdt claims were seized, were in his possession and, therefore, were either unmailed or already received.

3. *18 U.S.C. §§ 2510-2520*

[17] The complaint also alleges violations of 18 U.S.C. §§ 2510-2520, which concern interception of oral and wire communications and authorize private suit for damages. 18 U.S.C. § 2520. Defendants claim that any action under these sections should be dismissed because Schowengerdt has not alleged that any oral or wire communications were intercepted. While they are correct, Schowengerdt, in his memorandum in opposition to the motion to dismiss, does allege facts that indicate violations of these sections. Accordingly, this pleading defect presumably could be cured by amendment.

[18]Section 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

[19]The defendants claim that there is no private right of action under the statute, and the case law supports them. *Sciolino v. Marine Midland Bank-Western*, 463 F.Supp. 128, 131-34 (W.D.N.Y. 1979); *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144, 162 (D.D.C. 1976); *Hill v. Sands*, 403 F.Supp. 1368, 1371 (N.D. Ill. 1975).

4. *42 U.S.C. §1985(3)*

[18] The defendants claim that Schowengerdt cannot state a cause of action under 42 U.S.C. § 1985(3) because he has not alleged racial or other class-based animus. Such animus is a requirement for a cause of action under the statute. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *Mollnow v. Carlton*, 716 F.2d 627, 628 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). The only class to which the complaint might have reference, one based on sexual preference, does not support a section 1985(3) action. *See DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 332-33 (9th Cir. 1979).

5. *Privacy Act*

Schowengerdt alleges that defendant Lehman violated the Privacy Act, 5 U.S.C. § 552a, by mailing to Schowengerdt's home a letter, which was intercepted by members of his family, informing him that he was being considered for discharge from the Naval Reserve due to his sexual activities. 5 U.S.C. § 552a(b) limits the disclosure of federal agency records; § 552a(g)(1) provides a private cause of action against an agency for failing to comply with § 552a(b). The agency is the only proper party to such a suit; the civil remedy provisions do not apply to individual defendants. *See* 5 U.S.C. § 552a(g)(1); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir. 1985). Assuming without deciding that the head of an agency sued in his official capacity is a proper defendant, *see Hewitt v. Grabicki*, 794 F.2d 1373, 1377 n.2 (9th Cir. 1986), Schowengerdt has not stated a claim under this section.

[19] The sending of a letter containing information about an individual to that individual is not a "disclosure" within

the meaning of the Act. " 'A dissemination of information to a person . . . who [was] previously aware of the information is not a disclosure under the Privacy Act.' " *Pellerin v. Veterans Administration*, 790 F.2d 1553, 1556 (11th Cir. 1986) (quoting *Federal Deposit Ins. Corp. v. Dye*, 642 F.2d 833, 836 (5th Cir. Unit B 1981)). Furthermore, a letter directed to an employee, informing him about matters that might affect his employment status appears to be a "routine use" authorized under section 552a(b)(3). Thus, sending the letter to Schowengerdt did not violate the Privacy Act; the fact that his family members may have opened and read Schowengerdt's mail is unfortunate, but it cannot transform otherwise legal action into illegal action.

C. *Claim for Injunctive Relief from Military Discharge*

[20] Finally, Schowengerdt seeks injunctive relief from his discharge from the Air Naval Reserve. Although "[m]ilitary discharge decisions are subject to judicial review[,] . . . [w]e ordinarily require exhaustion of an agency's remedies before we will review an administrative decision." *Muhammad v. Secretary of the Army*, 770 F.2d 1494, 1495 (9th Cir. 1985) (citations omitted). At oral argument, the government stated that Schowengerdt had exhausted his administrative remedies. If this is true, the discharge decision is ripe for review by the district court.[21]

[21] If, on the other hand, the district court finds that Schowengerdt has administrative remedies available to him for the type of relief he seeks, *see, e.g.*, 10 U.S.C. §§ 1552, 1553, he must exhaust them unless "(1) . . . the remedies do not provide an opportunity for adequate relief; (2) . . . [Schowengerdt] will suffer irreparable harm if compelled to seek administrative relief; (3) . . . administrative appeal would be futile; or (4) . . . substantial constitutional questions are raised." *Muhammad*, 770 F.2d at 1495 (citing *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir. 1980)). The factual matters necessary to decide the appropriateness of judicial review of Schowengerdt's discharge obviously must be developed on remand.

IV. CONCLUSION

The judgment of the district court, dismissing Schowengerdt's complaint for failure to state a claim is reversed in part, affirmed in part, and remanded for further proceedings in accordance with this opinion.

APPENDIX D Petitioners Fourth Amended Complaint
dated 25 February 1988

FOURT AMENDED COMPLA NT 25 Feb 88
(Latest)

CARL B. PEARLSTON, Jr.
Suite 300
3555 Torrance Boulevard
Torrance, California 90503
Telephone 213) 371-6106 (or 543-2744)
Attorney for Plaintiff RICHARD NEAL SCHOWENGERDT

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RICHARD NEAL SCHOWENGERDT, Plaintiff, v. THE UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; C. W. KESSEL; K. D. TILLOTSON; CARL W. JENSEN, and RICHARD S. DAY, Defendants.	NO. CV 83-8007-AAH (Px) FOURTH AMENDED COMPLAINT FOR 1) Damages under the Federal Tort Claims Act; 2) Damages for Civil Rights Violations; 3) Declaratory and Injunctive Relief under the Federal Administrative Procedure Act; 4) Pendant Jurisdiction Claims: a) Invasion of Privacy; b) Trespass.

Plaintiff RICHARD NEAL SCHOWENGERDT alleges as follows:

COUNT I

(Tort Claims Against The United States of America)

1. This action is brought under the Federal Tort Claims Act, Title 28 USC Sections 2671 et seq., and the jurisdiction of this Court is predicated on Title 28 USC Section 1346(b). Plaintiff has complied with the requirements of Title 28 Sections 2401(b) and 2675(a) by filing an appropriate Claim on 31 May 1983, which was denied on 30 November 1983.

2. Plaintiff is a citizen of the State of California and a

resident of Orange County; venue is properly laid in this Court pursuant to Title 28, USC Section 1402(b).

3. At all times mentioned herein, Plaintiff held the position of Chief Warrant Officer, Naval Air Reserve, and was employed as a Civil Service Grade GS 13 General Engineer by the Department of the Navy, Naval Sea Systems Command [NAVSEA TECHREP (AEGIS)/Pomona], in Building 4 of the Naval Industrial Reserve Ordnance Plant (NIROP) in Pomona, California.

4. At all times herein mentioned, GENERAL DYNAMICS CORPORATION was a Corporation duly chartered under the laws of Delaware, and through its Pomona Division, provided security services for the Department of the Navy as its agent through the Naval Plant Representative Office (NAVPRO) at the aforesaid NIROP.

5. At all times herein mentioned, C. W. KESSEL was employed by GENERAL DYNAMICS CORPORATION as a security investigator on behalf of and as agent for NAVPRO at NIROP.

6. At all times herein mentioned, K.D. TILLOTSON was the Acting Naval Plant Representative at NIROP.

7. At all times herein mentioned, CARL W. JENSEN was a special agent for the Naval Investigative Service at El Toro, California.

8. At all times herein mentioned, RICHARD S. DAY was employed as a Chief of Security, Naval Ship Weapons Systems Engineering Station at Port Hueneme, California.

9. All of the wrongful acts complained of herein were committed by officers, employees, or agents of the United States of America, who were also functioning as investigative and law enforcement officers and under color of legal authority.

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10. On or about 9 August 1982, KESSEL wrongfully and unlawfully but under color of authority, violated Plaintiff's constitutional right to privacy by searching his locked office furniture and related documents for alleged pornography without Plaintiff's consent or reasonable cause, and wrongfully seized Plaintiff's private correspondence and photographs.

11. KESSEL wrongfully disclosed the aforesaid wrongfully obtained material to other persons including TILLOTSON, and on 10 August 1982, KESSEL, JENSEN, and TILLOTSON wrongfully and unlawfully and in conspiracy, but under color of authority, entered Plaintiff's office without his consent, and seized photographs and letters pertaining to Plaintiff's private sexual life, as well as other personal property.

12. Said employees and agents of the United States wrongfully and erroneously advised the United States Postal Service that Plaintiff was receiving and sending pornographic literature and photographs through the mail.

13. Said employees and agents wrongfully and erroneously advised the Naval Ship Weapons System Engineering Station and the Naval Reserve, that Plaintiff was involved in sodomy and homosexual activities.

14. DAY wrongfully and erroneously notified the Defense Investigative Service that Plaintiff was a security risk, thereby causing Plaintiff's Secret Security Clearance, essential for his livelihood, to be withheld for over one year.

15. The aforesaid acts have violated Plaintiff's right to privacy, freedom of association and speech, and freedom from

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unreasonable searches and seizures, and have injured Plaintiff by damaging his reputation, adversely affecting his employment and employment opportunities, disrupting his familial harmony, terminating his Naval career, and causing him severe and prolonged mental anguish, anxiety, and emotional distress, all to his damage in the sum of $1,000,000.00.

COUNT II

(Civil Rights Claims against General Dynamics Corporation and all Individual Defendants

16. This action arises under the First, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution. The jurisdiction of this Court is predicated on Title 28, USC Section 1331(a). Plaintiff is a Citizen of the State of California and resides in Orange County; venue is properly laid in this Court pursuant to Title 28, USC Section 1391(e).

17. Plaintiff refers to and incorporates herein by reference as though completely set forth herein, Paragraphs 3-8 and 10-15 of Count I of this complaint.

18. Defendants' acts were done with malice and conspirational intent to oppress and harass Plaintiff, and warrant the imposition of exemplary and punitive damages in the sum of $1,000,000.00.

COUNT III

(Review of Administrative Action against the Defendant of the Navy and the Secretary of the Navy)

19. This action is brought under the Federal Administrative Procedure Act, Title 5, USC Sections 701-706, and the Federal Declaratory Judgment Act, Title 28, USC Section 2201. Jurisdicti

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of this Court is predicated upon Title 28, USC Section 1331.

20. Plaintiff is a Citizen of the State of California and a resident of Orange County; venue is properly laid in this Court pursuant to Title 28, USC Section 1391(e).

21. At all times relevant herein, Plaintiff held the position of Chief Warrant Officer, Naval Air Reserve, assigned to the Pacific Missile Test Center, Point Mugu, Califonnia.

22. On 8 March 1983, Plaintiff was notified by his Commanding Officer that a Board of Officers would be convened to consider Plaintiff's separation from the service based on homosexuality, as a result of a report by the Naval Investigative Service consequent to a search of Plaintiff's personal effects at his place of work.

23. Said Board was convened on 22 June 1983, and despite Plaintiff's denials of homosexuality or homosexual conduct, and despite Plaintiff's exemplary record in the Navy, said Board recommended Plaintiff's discharge from the service. Said recommendation was adopted by the Secretary of the Navy, and Plaintiff received an honorable discharge from the service on 7 June 1984.

24. Said action of the Department of the Navy and the Secretary of the Navy was contrary to Plaintiff's rights under the First, Fourth, Fifth (due process: procedural, equal protection, and substantive) and Ninth Amendments to the Constitution of the United States, was contrary to Naval regulations, was unsupported by substantial evidence, and was arbitrary, capricious, and constituted an abuse of discretion.

25. Plaintiff has suffered irreparable injury as a consequence of his separaration from the Naval Service including loss of seniority, pay, active duty and retirement benefits.

26. Plaintiff has applied to the Board of Correction of Naval

Records for corrective action, which denied said application on 4 September 1985. Plaintiff has therefore exhausted his administrative remedies, and the issue is ripe for judicial review.

27. Plaintiff seeks a Declaratory Judgment to declare Plaintiff's rights in this matter, and an Injunction directed to the Department of the Navy and the Secretary of the Navy to reinstate Plaintiff to his former position in the Naval Reserve, together with all rights and benefits to which he is entitled.

COUNT IV

(Pendant Jurisdiction Claim for Invasion of Privacy Against General Dynamics Corporation and C. W. Kessel)

28. Plaintiff realleges as though completely set forth herein, the allegations of paragraphs 2, 3, 4, and 5 of Count I of the complaint.

29. On or about 9 August 1982, Defendants wrongfully and unlawfully violated Plaintiff's right to privacy by searching his locked office and personal effects for alleged pornography and related documents without Plaintiff's consent or reasonable cause, and wrongfully seized Plaintiff's personal correspondence and photographs.

30. Defendants wrongfully disclosed the aforesaid wrongfully obtained material to other persons, and further violated Plaintiff's right to privacy by conducting a further search of Plaintiff's personal effects on or about 10 August 1982, seizing additional alleged pornographic materials and other personal effects.

31. Defendants further wrongfully and erroneously advised to

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the United States Postal Service that Plaintiff was receiving and sending pornographic material through the mail, and further wrongfully and erroneously advised Plaintiff's employer that Plaintiff was engaged in sodomy and homosexual activity.

32. Plaintiff realleges as though completely set forth herein paragraph 15 of Count I and paragraph 18 of Count II of this complaint.

COUNT V

(Pendant Jurisdiction Claim for Trespass against Defendant General Dynamics Corporation and C. W. Kessel)

33. Plaintiff realleges as though completely set forth herein paragraphs 2, 3, 4 and 5 of Count I of this complaint.

34. On or about 9 and 10 August 1982, Defendants wrongfully trespassed into Plaintiff's personal effects and wrongfully took into their possession and control Plaintiff's private correspondence, photographs, and other effects.

35. Plaintiff realleges as though completely set forth herein paragraphs 31 and 32 of Count IV of this complaint.

WHEREFORE, Plaintiff prays for Judgment as follows:

1. Count I: General Damages of $1,000,000.00;

2. Count II: General Damages of $1,000,000.00, and punitive damages of $1,000,000.00, and reasonable attorney fees;

3. Count III: Declaratory Relief and an Injunction compelling the Department of the Navy and the Secretary of the Navy to reinstate Plaintiff to his former position as Chief Warrant Officer in the Naval Reserve, together with all rights and benefits to which he is entitled;

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4. Count IV: General Damages of $1,000,000.00, punitive damages of $1,000,000.00;

5. Count V: General Damages of $1,000,000.00, punitive damages of $1,000,000.00;

6. On all Counts, costs of suit herein.

7. Such other relief as to the Court seems reasonable, necessary and proper.

Dated: 25 February 1988

Respectfully submitted.

CARL B. PEARLSTON, Jr.
Attorney for Plaintiff

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APPENDIX E Excerpt from Security Services Agreement
Between General Dynamics/Pomona Division
And the Naval Plant Reresentative Office
For Security Support Services 27 Apr 1982

Security Services Agreement

Between

General Dynamics/Pomona Division

and the

Naval Plant Representative Office

for

Security Support Services

27 Apr 1982

Reference: (a) OPNAVINST 5510.1F Subj: Department of the Navy Information Security Program Regulation
(b) GD/P Security Manual
(c) DOD 5220.22M Subj: DOD Industrial Security Manual

1. PURPOSE

This agreement sets forth security services provided by General Dynamics/Pomona Division (GD/P) to the Naval Plant Representative Office (NAVPRO). This agreement is not a contractural requirement. It is intended to identify security related functions and responsibilities provided by General Dynamics/Pomona Division at the Naval Plant Representative Office, Pomona, CA. This document, as required by reference (a), complements the references above. In the event of conflict the references will take precedence.

2. RESPONSIBILITIES

a. The Commanding Officer of the Naval Plant Representative Office retains responsibility for all security functions assigned to the Commanding Officer by reference (a).

b. The Manager of Industrial Security and Safety of GD/P, retains responsibility for all contractor security functions assigned by references (b) and (c). The services to be provided to NAVPRO by GD/P, as delineated below, are to be construed as complementary services which supplement existing NAVPRO security functions.

3. SERVICES TO BE PROVIDED

a. GD/P will provide keys and cores to facility doors, buildings and office desks.

b. GD/P will assist NAVPRO Security in the minor repair or adjustments of classified locking devices.

c. GD/P shall enforce the badge/pass system to identify and control all military and civilian employees and visitors to NAVPRO.

-/-

d. GD/P Security Guards will conduct security checks within the NAVPRO area to insure that security safeguards are in effect for the protection of classified material. GD/P will take the following action:

(1) Unlocked classified containers:

(a) GD/P Security Guards finding a container open or improperly secured after working hours will notify the GD/P Guard Headquarters Captain to contact the NAVPRO Security Manager and Duty Officer, who will contact the custodian and require them to return. The custodian will inventory the container's contents, make a determination of possible compromise, and secure the container. If the NAVPRO Security Manager or Duty Officer cannot be contacted, the container will be secured by the GD/P Security Guard and report to Navy Security the following working day.

e. GD/P shall provide security protection in situations, such as but not limited to, incidents involving civil disturbances, drug abuse, alcoholism, riots or other disorders.

f. GD/P shall provide protection for all Government property, material, and equipment to prevent the unauthorized use, loss, theft, or trespassing, and investigate act of alleged espionage or sabotage. If an incident does occur GD/P will investigate the incident and report the findings to NAVPRO.

4. REVIEW

This agreement will be reviewed at least annually by both organizations. All changes will be coordinated and mutually agreed to by both NAVPRO and GD/P.

5. TERMINATION

In that the services provided to NAVPRO by GD/P are both complementary and supplementary this agreement may be terminated upon recipt of written notification by either organization.

B. M. HITT

Manager, Security and Safety
General Dynamics/Pomona Division
Pomona, CA

J. A. BENSON

Security Manager
Naval Plant Representative Office
Pomona, CA

REVIEWED and APPROVED BY:

G. F. WENDT/CAPT
Commanding Officer
Naval Plant Representative Office
Pomona, CA

General Duties on Post

Subject No. 8

1. Guard personnel on duty at gates shall be responsible for all the area within their view. They shall be constantly on the alert for any suspicious activity and/or individuals in these areas, and shall report any suspicious activity or person to Guard Headquarters immediately.

2. Guards are to read the "Roll-Call Sheet" and initial their assigned post duties each shift. The Roll-Call Sheet will list additional duties for each post for the shift, including the times of operation.

3. Guards will check all employees entering or leaving the plant for proper identification. Employee ID badges will be worn in plain sight. If the employee is without the badge a temporary badge will be issued upon proper company identification. The employee's name, department, date, time and temporary badge number will be logged. If an employee is without a badge on three consecutive days the employee will be required to purchase a new badge before entering the plant again.

4. All purses, packages, lunch boxes, and brief cases are to be opened for inspection when a person enters or leaves the plant. The guard is to make no comments on the personal contents of articles opened for inspection. Look for classified material, company property, cameras, recording devices, and weapons.

5. Guards are not to loiter at a post when relieved for breaks during the shift. The relieved guard should pass along information that is necessary, leaving immediately, and return to your assigned post as soon as possible.

6. Guards are not to accept anything such as paychecks, envelopes, keys, packages, etc., at the post to be passed on to any other person, or to be held for safekeeping for a period of time unless directed by the Shift Captain. Personal property cannot be taken into the plant for repairs by any employee.

7. Guards will refer those persons attempting to serve criminal subpoenas to the Security Office in Bldg. 6; civil subpoenas to the Employment Office in Bldg. 1.

8. Guards are not to operate any vehicles or machinery, or turn off any motors, etc., without the permission of the Shift Captain.

9. Guards are not to place telephone calls or accept charges from an outside call without the permission of the Shift Captain.

Specific Post Duties

Subject No. 9
(Continued)

(7) An AVO is issued Transportation, Dept. 4, employees in lieu of an employee pass when they leave the facility as a passenger in a vehicle to pick up vehicles on the outside of the facility. The AVO is signed by the Supervisor of Transportation. This AVO is issued monthly.

(8) From 1730 hours until 0600 hours, five (5) days a week, and all hours on Saturdays, Sundays, and Holidays, the guard or guards will be responsible for inspecting all exiting vehicles, with the exception of the Division General Manager's vehicle and the NAVPRO Commanding Officer's vehicle. It is realized that on Saturday when there is heavy pedestrian traffic some vehicles cannot be searched. Each vehicle that exits, whether it is a company or private vehicle will be given an inspection to insure that no company or government material or equipment is being removed without the proper authorization and paper work.

4. Post 8A (Pedestrian Gate east side of facility)

   a. Operates as a pedestrian gate (See "General Duties on Post")

5. Post 11 (Bldg. 1 Lobby)

   a. Operates as a pedestrian gate (See "General Duties on Post")

   b. Visitors to the Navy Office or persons requiring government identification are sent to this post where they will be directed to the Navy Security Office for their visitor identification.

   c. The guard will raise and lower the colors on the flag pole (as posted on the "Roll Call Sheet"). He will also raise the proper Naval penants when required.

6. Post 20 (Patrol Post)

   a. Duties as posted on the "Roll Call Sheet" or as assigned by the Shift Captain.

7. Post 22 (Patrol Post)

   a. Duties as posted on the "Roll Call Sheet" or as assigned by the Shift Captain.

Checking for Unsecured Classified Material

Subject No. 10

1. Guard will, in the normal performance of his/her duties, follow these procedures regarding the checking of desks and/or files for unsecured classified material and/or General Dynamics Private Information. (For detailed explanations regarding classified information, consult your Security Manual Digest.)

2. Guards shall at all times be constantly on the alert for classified material and/or General Dynamics Private Information which is not properly secured or under the surveillance of a responsible person. (See Sections I and V of Security Manual Digest for storage requirements.)

3. For purposes of these procedures, General Dynamics Private Information is considered classified material. (See Item 9 for exception.) Classified material is defined as all material, regardless of its physical makeup, which is marked or tagged with a security classification.

4. When checking an unlocked desk, perform the following:

   a. Carefully inspect the unlocked desk drawers for classified material which is not properly secured, being careful not to disturb or rearrange other material. If classified material is found, complete a Report of Infraction of Security Regulation, Form 3-124. (See Item 13 for instructions on completion of this form.) If you are unable to properly secure the material, take it to Guard Headquarters for safekeeping. If the material is too bulky to remove, call the Shift Captain for further instructions.

   b. Do not force or manipulate any desk drawers while checking. Do not break the seals on boxes or packages.

   c. If a desk shows evidence of tampering such as a broken lock or desk drawer, report it immediately to your Shift Captain.

   d. Do not report unlocked desks unless there is a breach of security.

5. When checking an unlocked file (including authorized files built into some desks), perform the following:

   a. If classified material is found, complete a Report of Infraction of Security Regulations, Form 3-124; use the highest classified material found. As sample, see instructions in Item 13 for completion of this form.

APPENDIX F Excerpt from Naval Investigative Service
dated 16 September 1982

UNCLAS.FOUO

NIS REPORT OF INVESTIGATION	09-16-82	2591755Z	
OCE: 11ET	CONTROL: 08-10-82N11-ET74-8GNA/F	STATUS: CLOSED	DATE: SODOMY

DISTRIBUTION: //MH-N0023/MC-N11HQ/MI-N11PH//

FBI WEST COVINA CA

MADE AT	MADE BY	
EL TORO CA	C W JENSEN	SPECIAL AGENT
ORIGIN: 08-10-82/NAVPRO POMONA CA	SUPPLEMENTAL DATA: EMPL: NAVSEASYSCOM POMONA CA	

R	SOCIAL SECURITY NO.	MILITARY SERVICE NO.	BIRTH (DATE)	(SPC)	(PLACE)
M	488-34-3139		09-20-30		SPRINGFIELD MO

MI TITLE

S/SCHOWENGERDT, RICHARD NEAL/GS-13 CIVILIAN

PARTICIPATING AGENTS
J T CUSACK, SPECIAL AGENT (NISRA EL TORO CA)
C D OLSON, SPECIAL AGENT (NISRA EL TORO CA)
J E SULLIVAN, SPECIAL AGENT (NISRA EL TORO CA)

SYNOPSIS

1. Investigation was initiated following the seizure of pornographic material by General Dynamic investigators in Subject's Government work space, NAVSEASYSCOM, Pomona, CA. Additional material was located in Subject's Government work space by the Naval Investigative Service. A review of the material disclosed Subject had solicited for homosexual acts through the mail system and that pornographic photographs had been mailed to Subject's private business, "Questant Enterprises," at a post office box. Subject has indicated in correspondence, wherein he solicites for both heterosexual and homosexual acts, that he is a missile engineer. The Postal Inspectors were notified and declined investigative jurisdiction. Subject was interrogated and stated he was bisexual. Investigation is closed.

PREDICATION

2. Investigation is predicated on the request of the Commanding Officer, Naval Plant Representative Office (NAVPRO), Pomona, CA.

BACKGROUND

3. Investigation was initiated following the discovery of pornographic material in Subject's Government work space, Room B, Building 4, Naval Sea Systems Command (NAVSEASYSCOM), Pomona, CA, on 08-09-82. The material was found by Charles W. KESSEL, General Dynamic Security Investigator, following receipt of an anonymous telephone call indicating the pornographic material could cause great embarrassment to the U.S. Government.

INTERVIEW WITH GENERAL DYNAMIC SECURITY

4. Charles W. KESSEL and Clarence R. JOHNSON, General Dynamic Security Investigators, NAVSEASYSCOM, Pomona, CA, briefed both LCdr K.D. TILLOTSON, Executive Officer, NAVPRO, and Reporting Agent after locating pornographic material in Subject's office. KESSEL stated he received an anonymous telephone call from a male caucasian at approximately 1330, 08-09-82. The caller indicated Subject possessed pornographic material in his Government work space which could cause great embarrassment to the U.S. Government. According to KESSEL, the caller stated the material could be found in the bottom left drawer of Subject's black colored cabinet. KESSEL stated he went to Subject's work space and located the pornographic material in the exact location the caller indicated. Preliminary review of the material disclosed Subject might be involved in homosexual activities. KESSEL released all of the pornographic material to Reporting Agent (08-10-82)

APPENDIX G Excerpt from Defense Investigative Service Report dated 22 August 1983

REPORT OF INVESTIGATION	DATE 22 Aug 83	LAT: 83220
83JPH	CONTROL 83159-DI2-3814-1V9	STATUS RUC

DISTRIBUTION
N-D0600 I-D53GA

COPY TO

MADE BY
S/ A M J MANDELL

SEX	SOCIAL SECURITY NO	FORMER MIL SV NO	BIRTH (DATE)	(GPC)	(PLACE)
M	488-34-3139		20 Sep 30		Springfield, MO

SUBJECT
SCOWENGERDT, RICHARD NEAL/Employee, Northrop Corp.

EMPLOYMENT REFERENCE

1. Michael H. Byron, Head, Personnel Operations Division, U.S. Naval Ship Weapon Engineering Station (NSWSES), Port Hueneme, CA, was interviewed and advised substantially as follows:

Byron was Subject's personnel advisor while Subject was a U.S. Government employee at NSWSES AND ASSIGNED TO THE General Dynamics (GD) facility, Pomona, CA. Byron had two to three times per year professional contact with Subject from 1978 to approximately Jan 1983 when Subject voluntarily resigned for another position. Byron was responsible for reviewing all reports of investigation and correspondence pertaining to the incident in 1982 involving pornographic material being found in Subject's work area at GD. After a complete investigation, a decision was made by the Navy that the incident did not warrant dismissal from government service or denial of security clearance or access. Subject received an oral admonishment to the effect that he used poor judgment by having such material stored in his desk at GD. Subject has filed a three million dollar ($3,000,000) lawsuit against the U.S. Navy, GD and the Security Officer, NSWSES for invasion of privacy, the confiscation of private property and causing his security clearance which was in effect at NSWSES being withdrawn pending the outcome of the DIS investigation. Byron was of the opinion the law suit would be heard in U.S. Federal Court, Washington, DC and the final outcome would take several years. The government's case is being handled by the legal office, U.S. Naval Shipyard, Long Beach, CA. According to Byron, Subject was a satisfactory employee at NSWSES in the performance of his official duties However, Byron did not want to comment upon Subject's suitability for a position . . trust because of his limited professional contact with Subject, and his knowledge of the above incident. Byron reiterated that NSWSES only admonished Subject for the incident in question and no other action was taken.

Schowengerdt makes name on leading journals

by JO1 R. D. Aranzazu

ATC Richard N. Schowengerdt of Weapons Systems 0176 (WEPSYS-0176) is a published author of several technical and managerial articles in leading journals. His most recent article, "Closed-Loop Testing Best for Missiles," appeared in the March 1981 issue of MICROWAVE Systems News. The unabridged version of it, "Closed Loop Testing," was also published in NATIONAL DEFENSE magazine, April 1981. This article is the culmination of nearly eight years of his investigation, presentation and frustration in connection with closed-loop versus open-loop testing of guided missiles. Other articles published were: "DVMs Generate Kickback Pulses" - Electronic Instrument Digest, June 1970; "Words of a New Idiate" - The New Age, September 1970; "Measuring Nanavolts With Low-Cost DVMs" - Instruments & Control Systems, March 1972 and "How Reliable Are Merit Rating Techniques" - Personnel Journal, July 1975.

Chief Schowengerdt is a general engineer in civilian life, working as a test and evaluation engineer for the Naval Sea Systems Command Technical Representative (AEGIS) Office in Pomona, Calif. There, he monitors the test and evaluation program for the Standard Missile Two design, its development and production. In this capacity he is also tasked to report on progress and problem areas to the AEGIS Weapon System Program Manager in Washington, D.C. As a designated Electronic Warfare and Electronic Environmental Effects specialist, ATC Schowengerdt also represents his office in seminars and other meetings.

Chief Schowengerdt's latest achievement generated from involvement in a series of investigations into the advantages and disadvantages of closed-loop testing. His first encounter with the subject occurred while he was on two weeks of active duty with NASRU-U3, an engineering Reserve unit at Point-Mugu. During this period he was assigned to the Countermeasures Division of the Naval Missile Center (NMC) where he was asked to participate in a proposal effort involving closed-loop testing of missiles under the environmental stringency of electronic countermeasures.

After completing his ACDUTRA, ATC Schowengerdt made a report entitled "Comparison of Closed-loop vs. Open-loop Laboratory Testing of Guided Missiles." Van Dusen, his supervisor at NAVSEASYSCOM, was impressed with it and allowed him to travel to the U.S. Naval Academy to present his report at the 31st Military Operations Research Society Symposium in June 1973. In June 1974, the same paper was presented at the Aeronautical Engineering Duty Office Symposium at North Island in San Diego while Chief Schowengerdt was in a Reserve status.

Following that symposium, he and Dr. John Clymer from the Navy Fleet Analysis Center in Corona, Calif. visited the Weapons Station, Seal Beach, Calif. to see Dave Apodaca. They made the recommendation to use closed-loop testing instead of the traditional open-loop testing as a way to simulate missile flight environments and evaluate performance parameters under more realistic conditions. Through their persistence against considerable opposition and their encouragement to Apodaca to pursue the development of the new technology at Seal Beach, the multi-million dollar test facility finally materialized and became operational in 1978.

ATC Richard N. Schowengerdt holds the magazine where his article was printed. (Photo by PH2 M. Robertson)

With this milestone in hand, Chief Schowengerdt wishes to acknowledge the efforts and concepts contributed by his longtime associate, Dr. Clymer, and the expertise of his co-author, Dr. Werner P. Koch of General Dynamics, Pomona, who helped "beef-up" the reliability considerations of their recent articles.

Currently, ATC Schowengerdt is waiting for his commission to chief warrant officer. His application for this rank was strongly endorsed by his commanding officer, Captain Roderic A. Spies. His selection for this program will benefit his command, which has a need for junior engineering officers, and the Navy as a whole with his vast knowledge in electronics and weapons systems engineering.

Chief Schowengerdt and his wife, Emiko, from Japan, reside in Costa Mesa, Calif. They have three children: Margaret, 29; Maria, 26; and Michael, 17.

Electronics skill added to NARU Training Devices

by JO1 R. D. Aranzazu

Tom C. Johnson was recently added to the civilian work force at NARU Point Mugu when his technological skills were introduced recently at the unit's Training Devices Division. Johnson is an electronics integrated systems mechanic. He will be tasked to operate the DIFAR 14B44 (P-3) and A-7 simulators.

Johnson, a former Navy man, gained electronics skill while serving the Navy as a fire control technician. When he left the service, he continued to sharpen his knowledge in the field of electronics at the Long Beach Naval Shipyard. At the shipyard, he operated, maintained and repaired automated testing systems.

Johnson, a WG-12, is married to the former Diana F. Ross of Terre Haute, Ind. The couple resides in Camarillo with their 2-month-old daughter, Rachel.

Tom Johnson

Naval Air Reserve News

Published monthly with appropriated funds in compliance with NPPH P-35. Views and opinions expressed herein are not necessarily those of the Department of the Navy.

Articles and photos for submission are welcome. Deadline is the 15th of each month. All photographs are official Navy Department photographs, unless otherwise credited.

Commanding Officer	CAPT William R. Budge
Executive Officer	CDR Robert G. Foster
Internal Relations Officer	LTJG Lisa A. Boyette
Editor	JO1 Rudy D. Aranzazu
Typist	Patricia A. Phillips

Address all submissions to Editor, Internal Relations Office, Naval Air Reserve Unit, Naval Air Station, Point Mugu, Ca. 93042

-/-

EVALUATION

SUMMARY

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SCHOUENGERT, R N, 488-34-3139, 820CT03-82DEC21

AIRCRAFT OPERATIONS AT A REMOTE SITE IN AN UNIMPROVED ENVIRONMENT.

CWO3 SCHOUENGERT ASSUMED RESPONSIBILITY FOR THE AVIONICS DIVISION WITH VIGOR AND ENTHUSIASM. DURING THIS REPORTING PERIOD THE UNIT WAS BEING REORGANIZED CAUSING CONSIDERABLE INDIVIDUAL EFFORT WITHOUT THE BENEFIT OF EXTENSIVE TIME IN THIS POSITION. HE SHOWED GOOD ORGANIZATION AND WAS QUICK TO EVALUATE DIVISION ASSIGNMENTS, TRAINING SCHEDULES AND PRODUCTION GOALS. HE IS THOUGHTFUL AND SENSITIVE IN DELEGATING AUTHORITY TO DIVISIONAL PETTY OFFICERS. HE UNDERSTANDS THE IMPORTANCE OF APPROPPIATE TRAINING PROGRAMS, AND ENSURES TIMELY DOCUMENTATION OF TRAINING ACCOMPLISHMENTS.

CWO SCHOUENGERT HAS EASILY ADAPTED TO THE ROLE OF SUPERVISOR AND MANAGER. HE EFFECTIVELY INTEGRATES HIS TECHNICAL EXPERTISE WITH MANAGEMENT SKILLS. HE DISPLAYS A SPECIAL ABILITY TO OBTAIN MAXIMUM PRODUCTIVITY FROM HIS PERSONNEL. HE IS ALSO ADEPT AT DRAWING OUT LEADERSHIP TALENTS FROM HIS PETTY OFFICERS.

CWO SCHOUENGERT IS WITH THE NAVAL SEA SYSTEMS COMMAND IN HIS CIVILIAN CAPACITY AND HAS PUBLISHED SEVERAL TECHNICAL PAPERS. HE SETS A FINE EXAMPLE OF MILITARY BEARING AND WEARS HIS UNIFORM WITH PRIDE. HE MAINTAINS A PHYSICALLY FIT APPEARANCE. THERE IS NO BIAS OF ANY KIND AND SUPPORTS EQUAL OPPORTUNITY PROGRAMS.

CWO SCHOUENGERT IS RECOMMENDED FOR PROMOTION TO CWO3 AND RETENTION IN THE NAVAL AIR RESERVE.

[redacted] MARCO DRIVE
CAMARILLO, CA 93010

I[illegible].CATION OF CRITICAL ELEMENTS

PD #

PRESENT INCUMBENT: R. N. SHOWENGERDT

CM LEVEL: CMC 801-13

POSITION TITLE: GENERAL ENGINEER

MERIT PAY UNIT: AEGIS SHIPBUILDING PROJECT

ORGANIZATION: PMS-400

CRITICAL ELEMENTS:

1. Monitors the status of testing of major subassemblies of the AEGIS (SM-2) Missile to assure compliance with the provisions of the contract, and adherence to the test plan schedule.

2. Reviews contractor generated test plans and test plan modification in coordination with the Missile Composite Design and Production Engineers.

3. Reviews contractor test and evaluation milestone data to ensure mutual understanding of requirements.

4. Coordinates Navy participation in the test program to assure that tests are properly conducted, and to provide the validation of test results.

5. Compiles technical reports and presentations to be delivered in oral or written form reflecting the position of status of work accomplished by, and/or problems encountered, defined, analyzed, evaluated and resolved by the office in the test and evaluation area, reflecting the technical bases of analyses and evaluations accomplished, conclusions reached and decisions taken, including complete evaluation and statement of the advantages and disadvantages of alternative positions.

REVIEW DATE: 8/30/81

COMMENTS:

Objective ERFORMANCE RECO..J ..

Objective # 1 An EEO objective must be included as #1

MEMBER'S NAME R. N. Schwendeman

Significant Objective? Yes X No

What is it you wish to accomplish? Objectives may include quantitative or qualitative areas. Further, they may deal with steps to be taken in areas such as research where output may be more uncertain

Provide career counseling for high school students interested in the MESA (Mathematics, Engineering, Science-Achievement) program and encourage participation by minorities and underprivileged groups.

MEASUREMENT STANDARDS

How will achievement of objective be measured (time, cost, quality, result, etc.)? Multiple standards should be applied to all objectives where appropriate

A. Talk to selected student groups about engineering and scientific opportunities in the Federal Service.

B. Provide career counseling in resume writing and interviewing skills for students interested in employment.

PERFORMANCE

1. On Target

A. Talk to at least on student group as described above during the appraisal year (1 July 1981 - 30 June 1982); or

B. Provide career counseling services as described above to at least three students during the appraisal year.

2. Above Target

A. Talk to at least two more student groups as described above during the appraisal year; or

B. Accomplish both 1A & 1B above; or

C. Provide career counseling services as described above to at least six more students during the appraisal year.

CONDITIONS AND ASSUMPTIONS

None

RECORD OF REVIEW

Initials indicate agreement that this step of the process has been completed. Please date your initials.

	Supervisor	Member	Supervisor's Supervisor
Objective Setting		4/25/81	10/17/81
Quarterly Review 1		4/27/82	
Quarterly Review 2	4/27/82	4/27/82	5/3/82
Quarterly Review 3			
Other Review or Revision			
Other Review or Revision			

MPS-7 1

*Only Required in Case of Revision

Objective # 1.

MEMBER'S NAME Schowengerdt

MEMBER SELF APPRAISAL

I consider myself to be on target with this objective since I spoke to one student group and counselled some individual students on career objectives during the appraisal year.

I attempted to set up another session to address a student grop but the schedule for guest speakers did not permit another speaker during this calendar year.

SUPERVISOR APPRAISAL

The employee is considered on target for this objective.

Comments/Revision:

OBJECTIVE PERFORMANCE RECORD SHEET

Objective # 2 An EEO objective must be included as #1.

MEMBER'S NAME R. N. Schowengerdt

Significant Objective? ☒ Yes ☐ No

What is it you wish to accomplish? Objectives may include quantitative or qualitative areas. Further, they may deal with steps to be taken in areas such as research where output may be more uncertain

Act as a coordinator for Navy comments relative to the Integrated Test & Evaluation Plan (ITEP) for the Standard Missile 2, Block II development program in order to achieve a timely review and finalization of the plan.

MEASUREMENT STANDARDS

How will achievement of objective be measured (time, cost, quality, result, etc.)? Multiple standards should be applied to all objectives where appropriate

A. Meet schedule requirements without sacrifice of quality of work.
B. Achieve Navy understanding and concurrence in the ITEP by harmoniously resolving differences of interpretation.
C. Provide coordinated set of comments to contractor.

PERFORMANCE

1. On Target

A. Complete review and obtain all Navy comments within required schedule constraints; and
B. Resolve all differences of interpretation; and
C. Deliver a coordinated and edited set of comments to the contractor prior to the scheduled deadline for receipt of comments.

2 Above Target

Achievement a A, B and C in 1 above and at least three weeks prior to the scheduled deadline for receipt of comments.

CONDITIONS AND ASSUMPTIONS

1. Achievement of 1 or 2 above is independent of contractor editing, typing, and publication efforts subsequent to delivery of the comments.
2. Achievement of 1 or 2 above is contingent upon written delegation of authority to act as coordinator as described above an notification of all meetings relative thereto.

RECORD OF REVIEW

Initials indicate agreement that this step of the process has been completed. Please date your initials.

	Supervisor	Member	Supervisor's Supervisor
Objective Setting	[illegible]	[illegible] 4/25/81	[illegible] 10/7/81
Quarterly Review 1		[illegible] 4/27/82	•
Quarterly Review 2	[illegible] 4/27/82	[illegible] 4/27/82	•
Quarterly Review 3			•
Other Review or Revision			
Other Review or Revision			

MPS-2 1/80

*Only Required in Case of Revision

Objective # 2

MEMBER'S NAME Schowengerdt

MEMBER SELF APPRAISAL

I consider myself to be above target with this objective as I completed the reviews and coordination of all versions of the ITEP at least three weeks prior to the scheduled deadline for receipt of comments during the appraisal year. I believe I met these schedule requirements without sacrifice of quality and harmonously resolved various differences of opinion and interpretation between government agencies and the contractor.

SUPERVISOR APPRAISAL

I concur with the employee's appraisal of his performance.

Comments/Revision:

MPS-2

OBJEC[illegible] PERFORMANCE RECORD SH

Objective # 3 An EEO objective must be included as #1

MEMBER'S NAME R.N. Schowengerdt

Significant Objective? [X] Yes [ ] No

What is it you wish to accomplish? Objectives may include quantitative or qualitative areas. Further, they may deal with steps to be taken in areas such as research where output may be more uncertain

Prepare a status report on the engineering difficulties experienced during SM-2 Block II development during the appraisal year. (See conditions and assumptions below)

MEASUREMENT STANDARDS

How will achievement of objective be measured (time, cost, quality, result, etc.)? Multiple standards should be applied to all objectives where appropriate

A. Report must summarize all difficulties encountered.

B. Report must interpret accurately and completely all difficulties encountered.

C. Report must be delivered prior to the end of the appraisal period.

PERFORMANCE

1. On Target

A. Provide summaries of Engineering Difficulty Reports (EDRs) and Engineering Quality Assurance Reports (E-QARs) encountered during the appraisal year; and

B. Provide a thorough interpretation of difficulties relative to the overall health of the missile; and

C. Deliver completed report prior to 30 June 1981.

2. Above Target

Accomplish A and B above, and

C. Deliver completed report prior to 15 June 1981.

CONDITIONS AND ASSUMPTIONS

1. Report will not contain EDRs or E-QARs generated after 1 June 1981.
2. Report will contain only EDRs or E-QARs brought to the attention of the EDR/EQAR Review Board for categorization or at the subsequent Formal Shipping Review.
3. Availability of EDRs/E-QARs.

RECORD OF REVIEW

Initials indicate agreement that this step of the process has been completed. Please date your initials.

	Supervisor	Member	Supervisor's Supervisor
Objective Setting			
Quarterly Review 1			•
Quarterly Review 2			•
Quarterly Review 3			•
Other Review or Revision			
Other Review or Revision			

• Only Required in Case of Revision

MPS-2 [illegible]

Objective # 3

MEMBER'S NAME Schowengerdt

MEMBER SELF APPRAISAL

I consider myself to be above target with this objective as I prepared the required summary report of E-QUARS on BLK II encountered during the appraisal year and delivered the report prior to 15 June 1982. This report provides an analysis and interpretation significantly different from that furnished by the contractor.

SUPERVISOR APPRAISAL

I consider the employee above target on this objective.

Comments/Revision:

OBJECTIVE PERFORMANCE RECORD SHEET

Objective # 4 An EEO objective must be included as #1

MEMBER'S NAME R. N. Schowengerdt

Significant Objective ☒ Yes ☐ No

What is it you wish to accomplish? Objectives may include quantitative or qualitative areas. Further, they may deal with steps to be taken in areas such as research where output may be more uncertain.

Coordinate Navy participation in test, evaluation, and failure diagnosis relative to SM-2 Blk II development hardware reported on EDR's and E-QARs. Follow-up with activities involved to ensure timely response to Program Management requirements.

MEASUREMENT STANDARDS

How will achievement of objective be measured (time, cost, quality, result, etc.)? Multiple standards should be applied to all objectives where appropriate.

A. Responses must be complete and unambiguous.
B. Responses must be timely so as to not adversely affect sell-off of missiles.
C. Records must be orderly and capable of quick recall.

PERFORMANCE

1. On Target

A. Ensure that government responses are complete, unambiguous, and identify appropriate corrective action.
B. Ensure that urgent requirements are met within 5 working days and routine requirements are met within 20 working days (See Conditions and Assumptions).
C. Establish and maintain files that can be easily utilized by anyone in the absence of PMS-400K12.

2. Above Target

Accomplish A above and

B. Ensure that at least 70% of the urgent requirements are met within 3 working days and 70% of the routine requirements are met within 10 working days; or
C. Establish a computerized EDR/E-QAR file for rapid recall, printout and plotting.

CONDITIONS AND ASSUMPTIONS

1. Urgent requirements are identified as situations where missile sell-off is imminent (within 7 days) and routine requirements are identified as situations where hardware will not be used in a missile for sell-off within 30 days.
2. Follow-up with government activities must be personally handled only by PMS-400K12 or a designated alternate in his absence.

RECORD OF REVIEW

Initials indicate agreement that this step of the process has been completed. Please date your initials.

	Supervisor	Member	Supervisor's Supervisor
Objective Setting		9/25/81	NR 10/17/81
Quarterly Review 1		4/27/82	•
Quarterly Review 2	4/27/82	4/27/82	•
Quarterly Review 3			•
Other Review or Revision			
Other Review or Revision			

MPS-2 1/80

• Only Required in Case of Revision

Objective # 4 MEMBER'S NAME Schowenperd

MEMBER SELF APPRAISAL

I consider myself to be above target with this objective as I completed all coordination work with Navy suppliers of GFE to EDRs/E-QAR on Blk II hardware within the required envelope of paragraph 2B of the Performance Standard. The performance of this objective has required extensive communications by phone and datafax with NWC/CL, NAC/Indianapolis, and PMTC to close out the discrepances.

SUPERVISOR APPRAISAL

I agree the employee is above target on this objective.

Comments/Revision:

MPS-2

-1-

OBJECTIVE PERFORMANCE RECORD SHEET

Objective # 5 An EEO objective must be included as # 1.

MEMBER'S NAME R. N. Schowengerdt

Significant Objective? ☒ Yes ☐ No

What is it you wish to accomplish? Objectives may include quantitative or qualitative areas. Further, they may deal with steps to be taken in areas such as research where output may be more uncertain.

Prepare a Functional Configuration Audit Plan (FCAP) relative to the appraisal of SM-2 Block II acceptance test parameters at the section and round levels (See definitions, conditions and assumptions below).

MEASUREMENT STANDARDS

How will achievement of objective be measured (time, cost, quality, result, etc.)? Multiple standards should be applied to all objectives where appropriate

A. FCAP must address a majority of the critical test parameters at section and round level.
B. FCAP must outline the specific type of parameter evaluations and criteria for establishment of appropriate test limits.
C. FCAP must be timely to meet schedule requirements.

PERFORMANCE

1. On Target
A. FCAP addresses at least 30% of the total number of parameters and at least 60% of the critical parameters.
B. FCAP describes type of plots required, number of samples, and statistical criteria for acceptance.
C. FCAP is delivered no later than 30 June 1982.

2 Above Target
A. FCAP addresses at least 40% of the total number of parameters and at least 70% of the critical parameters; and
B. FCAP meets 1B above; and
C. FCAP is delivered no later than 1 June 1982.

CONDITIONS AND ASSUMPTIONS

1. A critical parameter is one which, if degraded below specification requirements, would result in a 90% probability of failure of the mission.
2. FCAP will not contain actual test data but will be only a plan relative to the evaluation of data.

RECORD OF REVIEW

Initials indicate agreement that this step of the process has been completed. Please date your initials.

	Supervisor	Member	Supervisor's Supervisor
Objective Setting	[illegible]	[illegible] 9/25/81	[illegible] 10/7/81
Quarterly Review 1		[illegible] 4/29/82	•
Quarterly Review 2	[illegible] 4/27/82	[illegible] 4/27/82	•
Quarterly Review 3			•
Other Review or Revision			
Other Review or Revision			

*Only Required in Case of Revision

MJS-3 1/8

Objective # 5 MEMBER'S NAME Schowengerdt

MEMBER SELF APPRAISAL

At the time this objective was formulated, it was thought that the requirement for the Functional Configuration Audit(FCA) would materialize within the the appraisal year. Also, the priorities relative to Physical Configuration Audit(PCA) and FCA were clarified and brought under the umbrella of the Configuratinn Audit Review(CAR). Furthermore I was assigned the total responsibility for CAR and charged to execute the PCA prior to FCA in accordance with the proposal I presented subsequent to the formulation of this objective which shoud be re written for the following appraisal year to encompass the total CAR plan.

In view of the need to delay the FCA and because of the extra work involved with the PCA, I would rate my performance with this objective as above target.

SUPERVISOR APPRAISAL

~~The employee rated himself above target.~~ I disagree. He should be rated on target

Comments/Revision:

MPS-3 1/80

OBJECTIVE PERFORMANCE RECORD SHEET

Objective # 6 An EEO objective must be included as #1

MEMBER'S NAME R. N. Schowengerdt

Significant Objective? ☑ Yes. ☐ No

What is it you wish to accomplish? Objectives may include quantitative or qualitative areas. Further, they may deal with steps to be taken in areas such as research where output may be more uncertain

Coordinate Navy participation in special test programs such as E^3 (Electromagnetic Environmental Effects) and EW (Electronic Warfare) evaluations at NWSC Dahlgren, PMTC, APL/JHU and elsewhere as required. Prepare and deliver an annual summary report.

MEASUREMENT STANDARDS

How will achievement of objective be measured (time, cost, quality, result, etc.)? Multiple standards should be applied to all objectives where appropriate

A. Maintain a high level of awareness relative to the status of the EMC Control Plan, ECM Test plans, and test progress.
B. Assist outside test activities in the acquisition of necessary documents and information on a timely basis.
C. Deliver a complete and accurate summary report.

PERFORMANCE

1. On Target

A. Provide a verbal report to supervisor monthly relative to plans and test progress.
B. Provide required information within 30 days of receipt of the request.
C. Deliver the report described above no later than 30 June 1982.

2. Above Target

A. Provide a written report to supervisor monthly relative to plans and test progress; and
B. Provide required information within 15 days of receipt of 80% of the requests; and
C. Deliver the report described above no later than 1 June 1982.

CONDITIONS AND ASSUMPTIONS

1. PMS-400K12 is designated in writing as the E^3/EW representative for the TECHREP.
2. PMS-400K12 is assured attendance at all E^3 and EW meetings regardless of location.

RECORD OF REVIEW

Initials indicate agreement that this step of the process has been completed. Please date your initials

	Supervisor	Member	Supervisor's Supervisor
Objective Setting		9/25/81	10/17/81
Quarterly Review 1		4/27/82	•
Quarterly Review 2	4/27/82	4/27/82	•
Quarterly Review 3			•
Other Review or Revision			
Other Review or Revision			

MPS

*Only Required in Case of Revision

Objective # 6

MEMBER'S NAME Schowengerdt

MEMBER SELF APPRAISAL

I have endeavered to maintain a high level of awareness relative to the status of E-cubed activities during the past appraisal year and to assist outside agencies as requested to obtain or relay information necessary to pursue the planning or conduct of investigations. I submitted a summary report of E-cubed activities by memo dtd 29 June 1982.

In view of the above, I would consider my performance with this objective to be on target.

SUPERVISOR APPRAISAL

Concur with the employee's self evaluation.

Comments/Revision:

MERIT PAY EVALUATION SUMMARY

NAME	GM LEVEL	SSN	PERIOD COVERED
R. N. Schowengerdt	801-13		7/1/81-6/30/82
POSITION TITLE: Engineer			MERIT PAY UNIT: AEGIS
ORGANIZATION: AEGIS TECHREP			UIC

CRITICAL ELEMENTS
ATTACHED

SUMMARY OF INDIVIDUAL OBJECTIVES	Objective Description	Significant Objective? Yes	Significant Objective? No	Critical Element Number	Performance: Below Tgt	Performance: On Tgt	Performance: Above Tgt
EEO	Career Counseling		x	All		x	
2	ITEP Preparation	x		3,4			x
3	Engineering difficulty reporting	x		1,6			x
4	Failure diagnosis	x		1,2,5			x
5	Configuration Audit Review	x		3,4		x	
6	Electromagnetic environmental effects	x		1,2,6		x	
7							

Check One	Overall Performance Evaluation
	Substantially exceeded all objectives
	Substantially above target — most significant objectives
X	Above target — most significant objectives
	On target — all significant objectives
	On Target - some objectives
	Below target - one or more critical elements

MTS-4 4/81

	NAME POSITION	SIGNATURE	DA
Submitted by (immediate supervisor)	R. D. Cuddy SM-2 Program Manager		8/2
MPS Member acknowledgement			

Comments (if desired)

(Attach additional sheet(s) if more space required)

Approved by supervisor s immediate supervisor	C. R. Meinig, Jr.	
Approved by Merit Pay Reviewing Officer	Project Manager AEGIS Shipbuilding	

JUSTIFICATION - Required if overall evaluation differs from that which would result from direct application of individual objectives grades

this was done by phone and signed from Hoyt.

MPS-

QUALIFICATIONS INQUIRY FOR OVERSEAS ASSIGNMENT

NAVSO 12213/5 (5-69) S/N-0104-930-3005

FROM

RICHARD N. SCHOWENGERDT

NAME OF APPLICANT:

The above named applicant is being considered for overseas assignment. To determine the applicant's suitability and fitness, the Navy Department needs information concerning his qualifications from persons who have knowledge of his experience, abilities and personal characteristics. You will help us materially in evaluating the applicant's qualifications by answering the following questions as frankly and fully as you can. The information you provide will be treated as confidential. An envelope which requires no postage is enclosed.

a reply by _____
will be appreciated

To: Naval Sea Systems Command
Technical Representative (AEGIS)
Pomona, CA 91766

1. OVER WHAT PERIOD OF TIME HAVE YOU KNOWN THE APPLICANT?

FROM: June 1976 TO: Present

2. ARE YOU A RELATIVE OF THE APPLICANT BY BLOOD OR MARRIAGE?

[X] NO [ ] YES (Please state relationship)

3. IN WHAT CAPACITY WERE YOU ASSOCIATED WITH THE APPLICANT?

[ ] INSTRUCTOR [ ] EMPLOYER [X] SUPERVISOR [ ] CO-WORKER [ ] FRIEND [ ] OTHER (Specify)

4. PLEASE INDICATE BY CHECKING THE APPROPRIATE BOX HOW YOU WOULD RATE THE APPLICANT ON EACH OF THE FOLLOWING ITEMS

	SUPERIOR	ABOVE AVERAGE	AVERAGE	BELOW AVERAGE	NO BASIS FOR RATING
A. OVERALL COMPETENCE COMPARED TO OTHERS IN THE FOLLOWING FIELDS					
(1) ENGINEERING			X		
(2) MANAGEMENT			X		
(3)					
B. YOUR OPINION OF THE APPLICANT'S					X
(1) ABILITY TO ESTABLISH EFFECTIVE WORKING RELATIONS WITH - SUBORDINATES			X		
- SUPERIORS			X		
- CO-WORKER			X		
(2) DEPENDABILITY		X			
(3) WORK HABITS			X		
(4) ATTENDANCE (Average - No Attendance Problems)		X			
(5) ADAPTABILITY					

5. WOULD YOU REEMPLOY THIS PERSON?

[X] YES [ ] NO (If "No" please state reason)

6. DO YOU HAVE INFORMATION WHICH WOULD INDICATE THE APPLICANT IS NOT RELIABLE, HONEST, TRUSTWORTHY OR OF GOOD MORAL CHARACTER?

[X] NO [ ] YES (If "Yes" please explain fully in item 8.)

7. DO YOU HAVE ANY INFORMATION INDICATING THAT THIS PERSON'S EMPLOYMENT WOULD BE AGAINST THE INTEREST OF THE NATIONAL SECURITY?

[X] NO [ ] YES (If "Yes" please explain fully in item 8.)

8. USE THIS SPACE TO SUPPLY ANY ADDITIONAL INFORMATION YOU FEEL IS PERTINENT IN CONSIDERING THE APPLICANT'S QUALIFICATIONS FOR THE POSITION DESCRIBED, OR FOR ANY EXPLANATION YOU MAY WISH TO MAKE TO YOUR ANSWERS ABOVE.

SIGNATURE	TITLE OR POSITION	DATE
Gary A. Lund LCDR USN	NAVSEATECHREP(AEGIS)/POMONA	20 March 1978

Persons selected for overseas positions may encounter unfamiliar situations and vastly different living and working conditions from those they are accustomed to. Such factors as climate, isolation, language, culture, attitude of natives toward the United States, etc., may separately or in combination contribute to the problem of adjustment. For example, there are places where all drinking water must be boiled, where such things as telephone service and public transportation services are virtually nonexistent, etc. In view of these facts, it is necessary that an individual selected for overseas employment be able to adapt. We have mentioned a few of the potential problems associated with overseas employment so that you may keep them in mind in evaluating the applicant.

1. DO YOU THINK HE WOULD BE ABLE TO ADJUST TO UNFAMILIAR SITUATIONS AND TO DIFFERENT LIVING AND WORKING CONDITIONS?

YES

2. IS HE MATURE AND EMOTIONALLY STABLE?

YES

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1991

NO._____

RICHARD N. SCHOWENGERDT, PETITIONER

v.

U.S.A. ET. AL.

PROOF OF SERVICE

I, Richard Neal Schowengerdt, do swear or declare that on this date, 27 November 1991, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION TO PROCEED AS VETERAN and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

U.S. Department of Justice
United States Attorney
312 North Spring Street
1100 U.S. Courthouse
Los Angeles, CA 90012
Attn: Donna R. Eide, AUSA

Gibson, Dunn & Crutcher
2029 Century Park East, Ste. 40
Los Angeles, CA 90067
Attn: Nancy P. McClelland

Soliciter General
Department of Justice
Washington, D.C. 20530

Richard N. Schowengerdt

STATE California
COUNTY OF Los Angeles

SUBCRIBED AND SWORN (OR AFFIRMED) TO BEFORE ME THIS 27th
DAY OF NOVEMBER 1991.

EVANGELENE FRANCIS

OFFICIAL NOTARY SEAL
EVANGELENE FRANCIS
Notary Public — California
LOS ANGELES COUNTY
My Comm. Exp. AUG 04,1995

(3)

No. 91-1009

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD NEAL SCHOWENGERDT,

Petitioner,

v.

THE UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; JOHN LEHMAN, SECRETARY OF THE NAVY; GENERAL DYNAMICS CORPORATION; CHARLES W. KESSEL; K.D. TILLOTSON; CARL W. JENSEN; and RICHARD S. DAY,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS GENERAL DYNAMICS CORPORATION AND CHARLES W. KESSEL

Of Counsel:

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Attorneys for Respondents General Dynamics Corporation and Charles W. Kessel

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the Ninth Circuit was correct in affirming the district court's factual determination that, based upon the operational realities of petitioner's workplace, petitioner did not have a reasonable expectation of privacy in his office credenza sufficient to implicate the Fourth Amendment.

STATEMENT OF INTERESTED PARTIES

All parties to the proceedings below are named in the caption. Pursuant to Supreme Court Rule 29.1, the following is a list of the subsidiaries of respondent General Dynamics Corporation: American Overseas Marine Corporation; Amsea Services Corporation; Applied Remote Technology, Inc.; The Cessna Aircraft Company; Cessna Finance Corporation; Cessna Fluid Power-Europe, Inc.; Cessna Foundation, Inc.; Pawnee Industrial District; United Hydraulics Corporation; Wallace Industrial District; Concord I Maritime Corp.; Braintree I Maritime Corp.; Concord II Maritime Corp.; Braintree II Maritime Corp.; Concord III Maritime Corp.; Braintree III Maritime Corp.; Concord IV Maritime Corp.; Braintree IV Maritime Corp.; Concord V Maritime Corp.; Braintree V Maritime Corp.; Electrocom, Inc.; Emetrics, Inc.; Etudes Techniques et Constructions Aerospatiales, Societe Anonyme (ETCA); GD Financial Corporation; General Dynamics (C.I.) Limited; General Dynamics Credit Corporation; General Dynamics Commercial Launch Services, Inc.; General Dynamics Export Sales Corporation; General Dynamics Foreign Sales Corporation; General Dynamics-Hellas, S.A.; General Dynamics International Corporation; General Dynamics International Services, Inc.; General Dynamics Land Systems Inc.; General Dynamics Land Systems International, Inc.; G. T. Devices, Inc.; General Dynamics Services Company; GD Ho-Chin, Incorporated; General Dynamics Base Corporation; General Dynamics Nevada Company; Helava Associates, Inc.; Hellenic Business Development & Investment Co., S.A.; Material Service Corporation; Darlington Brick & Clay Products Company; EPSP, Inc.; Energy Dynamics,

Inc.; Freeman United Coal Mining Company; Industry Development Corporation; Marblehead Lime Company; Material Energy Sales Corporation; Material Service Corporation of Indiana; Material Service Foundation; Mineral and Land Resources Corporation; MLRT, Inc.; MSC Realty & Development Co.; Powell & Minnock Brick Works, Inc.; Producers Construction Co.; Producers Supply Company; Producers Towing Company; Republic Resources Corporation; Utah Marblehead Lime Company; Viking International Petroleum Corp.; Vow Conco Construction Company, Inc.; Patriot I Shipping Corp.; Patriot II Shipping Corp.; Patriot IV Shipping Corp.; Quincy Corporation; S-C 1951 Credit Corporation; S-C 1969 Credit Corporation; A.T. Sales Ltd.; Convair Aircraft Corporation; Convair Corporation; Braintree I Equity Corporation; Braintree II Equity Corporation; Braintree III Equity Corporation; Braintree IV Equity Corporation; Braintree V Equity Corporation; The Elco Company; Electric Boat Company; Freeman Coal Mining Limited; GDAT Corporation; General Dynamics Communications Company; General Dynamics Kabushiki Kaisha; General Dynamics Limited; General Dynamics Manufacturing Limited; General Dynamics of Turkey Incorporated; Hulcher Quarry Inc.; Indian Point Limestone, Inc.; Kammerer Products Company; Lexington I Maritime Corp.; Lexington III Maritime Corp.; Lexington IV Maritime Corp.; Lexington V Maritime Corp.; Material Service Industries, Inc.; Patriot III Shipping Corp.; Patriot V Shipping Corp.; Resources Corporation; The Elco Company; Thornton Quarries Corporation; and United Electric Corporation. There is no parent company of respondent General Dynamics Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

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Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS GENERAL DYNAMICS CORPORATION AND CHARLES W. KESSEL

Respondents General Dynamics Corporation ("General Dynamics") and Charles W. Kessel respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case.

OPINIONS AND JUDGMENTS BELOW

The July 30, 1987 opinion of the United States Court of Appeals for the Ninth Circuit is reported at

823 F.2d 1328 and reproduced in the Appendix to the Petition for Writ of Certiorari ("Petitioner's Appendix") at Appendix C. The district court's December 28, 1988 unreported findings of uncontroverted facts and conclusions of law, and corresponding summary judgment in favor of respondents General Dynamics and Kessel are reproduced in Petitioner's Appendix B at pages 40-54. The Ninth Circuit Court of Appeals decision directly below affirming respondents' summary judgment and from which petitioner seeks a writ of certiorari is reported at 944 F.2d 483 and reproduced in its prepublished form at Petitioner's Appendix A.

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment in favor of all respondents on September 6, 1991. On December 2, 1991, petitioner filed the instant petition and invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). On January 7, 1992, pursuant to the request of respondents General Dynamics and Kessel, all respondents were granted an extension of time within which to file a response to the petition to and including February 4, 1992. On January 28, 1992, pursuant to the request of the Solicitor General, on behalf of all the other respondents (the United States of America, John Lehman, Secretary of the Navy, and Navy personnel Carl Jensen, K.D. Tillotson and Richard Day), all respondents were granted an extension of time within which to file a response to the petition to and including March 4, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

There are no federal statutes involved with respect to the claims and issues pertaining to respondents General Dynamics and Kessel.

STATEMENT OF THE CASE

A. Procedural Background.

This action arises principally out of two August 1982 searches of petitioner's office at his former workplace, the Naval Industrial Ordnance Plant in Pomona, California (the "Facility"). The first search, limited to a credenza in the office assigned to petitioner, was conducted on August 9 by respondent Charles Kessel, a General Dynamics security investigator. The second search was conducted on August 10 by respondents Carl Jensen, a special agent for the Naval Investigative Service, and K.D. Tillotson, Navy Commanding Officer at the Facility. Petitioner contends that the searches and his subsequent discharge from the Naval Reserves violated various of his constitutional rights.

The facts of the case are set forth in the decisions below, specifically the Ninth Circuit's reported decision at 944 F.2d 483, and the district court's unreported findings of uncontroverted facts and conclusions of law at Petitioner's Appendix B.[1] As those decisions indicate, petitioner has raised separate claims, based upon distinct events, against the various respondents in this action.

Petitioner's single claim against respondents General Dynamics and Kessel is brought under a constitutional theory of liability established in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[2] That claim is predicated upon petitioner's contention that Kessel's August 9 search of his office credenza violated his Fourth Amendment rights. This brief in opposition to the petition for writ of certiorari addresses solely the summary judgment in favor of respondents General Dynamics and Kessel, which was affirmed by the Ninth Circuit.

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[1] Respondents object to two documents attached to petitioner's Appendix, specifically page 1 of Appendix F and page 1 of Appendix H. Those documents were not part of the record when the district court granted respondents' summary judgment motion. Although those documents have no relevance to whether the instant petition should be granted, respondents object to those documents here under Supreme Court Rule 15.1, which requires respondents to point out misstatements of the record in this opposition brief.

[2] Petitioner alleged a cryptic conspiracy claim against certain of the respondents, although it has never been clear which respondents. Nevertheless, petitioner expressly stated that "he has chosen not to address the conspiracy charge in this [petition] for purposes of narrowing the scope of the Supreme Court review to essential Constitutional issues." Petition at 8 n.2.

For purposes of their summary judgment motion only, private respondents Kessel and General Dynamics assumed they were federal government agents acting under color of federal authority, but argued that petitioner's *Bivens* claim nevertheless failed for numerous reasons. In particular, as both the district court and the Ninth Circuit ruled, the undisputed evidence demonstrated petitioner did not have a reasonable expectation of privacy in his office or the credenza contained therein.[3] Thus, petitioner's Fourth Amendment rights were not implicated, let alone violated, by Kessel's limited August 9 search of petitioner's credenza (or by the subsequent August 10 search of petitioner's office by the federal respondents).[4]

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[3] In an earlier decision, at 823 F.2d 1328 (Petitioner's Appendix C), the Ninth Circuit reversed the district court's ruling granting respondents' motion to dismiss, which argued petitioner failed to allege sufficient facts to establish that he had a reasonable expectation of privacy. In so ruling, the Ninth Circuit applied this Court's decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987), and concluded that, in deciding whether petitioner had a reasonable expectation of privacy, the district court needed to examine the "operational realities" of petitioner's workplace to determine whether petitioner was on notice that searches of the type conducted might occur from time to time. *See* 823 F.2d at 1334-35. That was precisely the analysis engaged in by the district court and the Ninth Circuit in granting and affirming, respondents' summary judgment motion, respectively. Petitioner's Appendix B at 49-50; 944 F.2d at 488-89.

[4] The district court also ruled that, assuming petitioner had a reasonable expectation of privacy, Kessel and General Dynamics were still entitled to summary judgment on the following alternative and independent grounds: (1) Kessel's limited search was a workplace search that was reasonable under all the circumstances; (2) Kessel's limited search was a valid administrative

Accordingly, the lone issue here with respect to respondents General Dynamics and Kessel is simply whether the lower courts correctly concluded that petitioner did not maintain a reasonable expectation of privacy in his office credenza. Respondents respectfully submit that that factual issue does not warrant the exercise of this Court's discretionary review power.

B. Factual Background.

1. Security Measures At The Facility Are Extensive And Well Understood By Facility Personnel.

At all times relevant to this action, petitioner was employed by the United States Navy and worked at the Facility. 944 F.2d at 485. The Facility houses a wide variety of secret and top-secret military weapons, and is used for designing, manufacturing and testing such weapons. *Id.* In his capacities as an engineer and Chief Warrant Officer of the Navy, petitioner worked directly on secret and top-secret weapons-related projects at the Facility. *Id.* Accordingly, petitioner was required to hold a "secret" security classification. *Id.*

Although the Facility is owned by the Navy, it is jointly operated by General Dynamics, which provides security services for the Facility. *Id.* Because of the Facility's highly sensitive operations, the security precautions taken and implemented at the facility by

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inspection in a highly-regulated industry; and (3) respondents were entitled to qualified immunity for Kessel's limited search. Petitioner's Appendix B at 50-53. The Ninth Circuit did not address any of those alternative rulings because it affirmed the dispositive factual ruling that petitioner did not have a reasonable expectation of privacy. 944 F.2d at 487 n.4.

General Dynamics are extensive. *Id.* Indeed, as the Ninth Circuit found, "[u]pon entering and leaving [a] building, and in the innermost recesses of their offices, employees [are] being constantly searched and surveilled for compliance with security precautions in a manner that would be considered unduly invasive in a more conventional work place." *Id.* at 488.

As a thirteen year employee at the Facility, petitioner was well aware of General Dynamics' extensive security procedures at the Facility. *See id.* at 485. For example, he personally observed his office being searched on numerous occasions by General Dynamics security personnel. *See id.* Additionally, petitioner "was well aware that every time an employee entered or exited the Facility, the employee and the employee's belongings, including all packages, briefcases and purses, were subject to search regardless of the employee's consent, by guards at pedestrian entrances to the Facility and by guards at vehicle gates who had the authority to search all vehicles arriving at or departing from the Facility, including the glove compartments, trunks and closed containers inside a vehicle or trunk." Petitioner's Appendix B at 44.

Further, like all Facility personnel, petitioner regularly attended mandatory security briefings, at which Facility personnel were instructed on all security measures in place at the Facility and the purposes therefor. *See* 944 F.2d at 485. "In those briefings, they [Facility personnel] were made aware that the Navy's security concerns extended beyond physical protection of classified documents, and included concerns that employees not divulge classified information to inappropriate sources." *Id.* In particular, the

Navy concerns "encompassed a variety of conditions which might compromise an employee's ability to maintain security, including those which might make an employee susceptible to blackmail." *Id.* In that regard, petitioner admitted he was aware "that the Navy was concerned employees might be tempted to sell classified information, or might be either induced or blackmailed into divulging information as a result of a romantic liaison." *Id.* at 488 n.5.

2. Employee Offices And Their Contents Are Frequently Searched.

As noted above, as part of the extensive security measures in place at the Facility, individual employee offices and their contents are subject to a variety of frequent searches. Further, as described below, the searches are often conducted in the absence of the individuals to whom the offices are assigned, and often involve searching locked offices and locked areas within offices.

Among the various types of individual office searches are searches conducted by General Dynamics security guards, who check working spaces for security violations. *See id.* at 485. Those searches are conducted frequently, and on both scheduled and random bases. *Id.* Pursuant to such guard searches, petitioner's office was searched daily, in his absence. *Id.* Further, the General Dynamics guards possessed keys to petitioner's office and searched his office for security violations even when his office was locked. *See id.* at 485, 488.

In addition to the frequent scheduled and random searches conducted by security guards, employees also conduct security checks of their fellow employees' of-

fices. *See id.* Like the searches conducted by security guards, employees extensively check each other for security violations. *See id.* For example, when petitioner checked his colleagues' offices, "he would pull on drawers to see whether they were locked and, if they were not, he 'might be inclined to look inside and see if there were any documents lying loose, classified documents.'" *Id.*

In addition to security guard and employee searches, General Dynamics' security investigators also conduct office searches. *See id.* at 485. The security investigators have extensive responsibility for conducting investigations into any possible compromises of security brought to their attention. *See id.* "In Schowengerdt's words, these investigators were authorized to 'look into more things than a guard would look into, . . . [into] details that a guard would not be expected to look into, trying to determine what happened in a situation.'" *Id.* (ellipsis and bracketed text in original).

To carry out their broad function, General Dynamics' security investigators, like the security guards, have access to keys to employee offices, as well as to the furniture within offices. *See id.* at 485, 488. In that regard, petitioner "was well aware that security investigators had access to duplicate keys should they wish to pursue an investigation into his locked desk or credenza." *Id.* at 488.

3. Kessel's Limited Search Of The Credenza Disclosed Materials Indicating A Compromise Of Security.

On August 9, 1982, General Dynamics security investigator Kessel conducted a limited search of the credenza in the office assigned to petitioner, which was located in Building 4, where particularly sensitive

military and national security documents and hardware are stored. *Id.* at 485; *see* Petitioner's Appendix B at 44. That search was precipitated by an anonymous telephone tip, which stated that "material of interest to the security department" was contained in the credenza in petitioner's office. 944 F.2d at 485.

Kessel confined his search to the place (the credenza) where the informant said the material would be found. *Id.* In that place, Kessel found a manila envelope with the following inscription on the outside: "Strictly Personal and Private. In the event of my death, please destroy this material as I do not want my grieving widow to read it." *Id.* The manila envelope contained correspondence and photographs concerning petitioner's involvement in various heterosexual and bisexual activities. *Id.* Additionally, the correspondence demonstrated that petitioner solicited such sexual encounters through ads placed in "swingers" magazines and sexually-oriented organizations. *See id.*

In addition to the inscription on the outside of the manila envelope—which itself suggested petitioner had something to hide—the correspondence within the envelope contained evidence suggesting petitioner may have compromised security on numerous occasions. *Id.* at 486 n.2. In that regard:

> [S]everal of [petitioner's] letters soliciting sexual liaisons made reference to the fact that he worked for the Navy as a missile engineer, and included his office telephone number and his Navy engineer business card; he included photographs of himself in his Navy uniform, as well as nude; and one letter from an Italian stewardess indicated

that she was seeking sexual relationships primarily with servicemen.

Id.

4. Petitioner Conceded The Decision To Search His Credenza Was Warranted.

As noted above, petitioner was aware that security investigators were accorded broad investigatory powers, and that they had access to keys to offices and the furniture within offices. *Id.* at 485, 488. Moreover, petitioner acknowledged that such investigations were warranted "*when*[*ever*] *an indication that a security compromise has been made* or is being contemplated by an employee *because of some reason which has come to their attention* or there is evidence of theft, etc." *Id.* at 489 n.6 (emphasis in original). Accordingly, petitioner conceded that Kessel's decision to search his credenza—which was triggered by a tip suggesting a security compromise—was warranted. *Id.*

5. The Events After August 9, 1982 Do Not Involve Respondents General Dynamics And Kessel.

As indicated above, petitioner testified that the Navy was particularly concerned employees "might be either induced or blackmailed into divulging information as a result of a romantic or sexual liaison." *Id.* at 488 n.5. Certainly, "the inscription on the manila envelope would serve only to trigger the curiosity of an investigator, or any fellow employee, trained to be alert to possibilities of blackmail." *Id.* at 488-89. Additionally, the correspondence within the envelope furthered the possibility that security was compromised in that regard. *Id.* at 486 n.2. Thus, on August 10, the day after he found the manila envelope, Kessel

turned it over to the Navy.[5] *Id.* Specifically, Kessel gave the materials to Lieutenant K.D. Tillotson, the Navy Commander at the Facility. *Id.*

On August 10, the same day he received the materials from Kessel, Tillotson, along with Naval Investigative Service special agent Carl Jensen, conducted a search of petitioner's office.[6] That search was authorized by Jensen's Navy supervisor. 944 F.2d at 485; *see* Petitioner's Appendix B at 47. During that search, the Navy seized additional items from petitioner's office. 944 F.2d at 485.

The events occurring after Kessel turned over the manila envelope and its contents to the Navy do not involve private respondents Kessel and General Dynamics. Those events, which eventually resulted in petitioner's discharge from the Naval Reserve for being bisexual, involve the other (federal) respondents. Indeed, in his brief to the Ninth Circuit, petitioner acknowledged that the alleged involvement of Kessel and General Dynamics in the events underlying this action ended when Kessel turned over to the Navy the manila envelope and its contents.

SUMMARY OF ARGUMENT

As both the district court and the Ninth Circuit held, respondents Kessel and General Dynamics were

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[5] General Dynamics is obligated to report to the Navy any information suggesting the possible compromise of security. Petitioner's Appendix B at 47.

[6] Kessel was present at the second search, but he did not actively participate in it. Petitioner's Appendix B at 47. However, even if Kessel had actively participated in that search, it would not affect whether, as a factual matter, petitioner had a reasonable expectation of privacy in his office or the credenza therein.

entitled to summary judgment because the undisputed evidence established petitioner did not have a reasonable expectation of privacy in his office or the credenza therein. Petitioner's Appendix B at 49-50; 944 F.2d at 488-89. Thus, the limited August 9 search by Kessel (and the August 10 search by the federal defendants) did not implicate, let alone violate, petitioner's Fourth Amendment rights. As the Ninth Circuit stated:

> The district court concluded that "the operational realities" of Schowengerdt's workplace precluded his having an objectively reasonable expectation of privacy in his office, desk or credenza. After *de novo* review of that conclusion, [citation omitted], we agree. Petitioner may have had a subjective expectation of privacy in his credenza, or the manila envelope in it, but that expectation was not objectively reasonable.

944 F.2d at 488.

Petitioner's instant petition for a writ of certiorari essentially amounts to a request that this Court review the lower courts' factual determination that he did not have a reasonable expectation of privacy. Respondents respectfully submit that such a request is hardly a "special and important reason" for the Court to exercise its certiorari discretion. *See* Sup. Ct. R. 10.1. Nor does the petition even remotely implicate any of the enumerated reasons set forth in Supreme Court Rule 10.1 for the issuance of a writ of certiorari. In fact, this Court has repeatedly recognized that certiorari is not proper for reviewing factual determinations.

In short, petitioner's request that the Court review the lower courts' factual determination is misplaced. Moreover, even if the Court were inclined to entertain such an inquiry, respondents respectfully submit that the undisputed evidence mandates the conclusion independently reached by each of the lower courts—that petitioner did not maintain a reasonable expectation of privacy in his office or the credenza.

REASONS FOR DENYING THE PETITION

I

THE NINTH CIRCUIT'S FOURTH AMENDMENT FACTUAL ANALYSIS IS CONSISTENT WITH THE FOURTH AMENDMENT DECISIONS OF THIS COURT AND DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER CIRCUIT COURT

At page 11 of his petition, petitioner asserts that "[t]he decision of the Circuit Court in affirming the District Court's ruling is at variance with several major rulings in other circuit courts as well as in the Supreme Court." Petition at 11. In support of that position, in the section of his petition on the Fourth Amendment (pages 13-16), plaintiff cites cases which demonstrate that he misunderstands both the Ninth Circuit's ruling below and the cases upon which he relies. The Ninth Circuit's decision is entirely consistent with the decisions of this Court and the other circuits, and there is no basis for certiorari review.

This Court has made clear that the seminal inquiry in a Fourth Amendment analysis is whether "the person invoking its protection can claim a 'justifiable,' 'reasonable,' or 'legitimate expectation of privacy' that

has been invaded by government action."[7] *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Thus, petitioner's Fourth Amendment rights were implicated only if Kessel's search of the credenza infringed "an expectation of privacy that society is prepared to consider reasonable." *Id.*; *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *California v. Ciraolo*, 476 U.S. 207, 211 (1986). Accordingly, the Ninth Circuit's factual analysis—whether petitioner had a reasonable expectation of privacy—was not only consistent with, but was compelled by, the legal standards established in this Court's Fourth Amendment decisions.

In his section on the Fourth Amendment, petitioner cites only one Supreme Court case, *O'Connor v. Ortega*, 480 U.S. 709 (1987), which he claims is in conflict with the Ninth Circuit's ruling. However, that case is entirely consistent with the Court's other Fourth Amendment cases, and, correspondingly, the Ninth Circuit's factual analysis. Indeed, in *O'Connor*, the Court stated that "[o]ur cases establish that Dr. Ortega's Fourth Amendment rights are implicated only if the conduct of the Hospital officials at issue in this case infringed 'an expectation of privacy that society is prepared to consider reasonable.'" *Id.* at 715 (plurality opinion), quoting *United States v. Jacobsen*, 466 U.S. at 113; *see also id.* at 737 (Blackmun, J., dissenting). More specifically, eight justices indicated that, in the workplace context, whether an employee's expectation of privacy is reasonable turns upon the "operational realities of the workplace." *Id.* at 1497 (plurality opinion); *id.* at 1508 (Blackmun, J.,

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[7] Again, respondents Kessel and General Dynamics assumed only for purposes of their summary judgment motion that they were federal agents acting under color of federal authority.

dissenting). That was the precise standard applied by the Ninth Circuit in this case. *See* 944 F.2d at 488.

Nevertheless, petitioner apparently contends the Ninth Circuit's ruling conflicts with *O'Connor* because, in *O'Connor*, "a majority of the Court agree[d] with the determination of the Court of Appeals that [the] respondent [in *O'Connor*] had a reasonable expectation of privacy in his office." *See* Petition at 14. Petitioner's apparent position is clearly misplaced. *O'Connor* was obviously decided on the particular facts present in that case, and does not resolve the factual issue here, which turns upon its own (and entirely different) facts. Indeed, as the Court stated in *O'Connor*, "[g]iven the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *O'Connor*, 480 U.S. at 718; *see also id.* at 733. The Ninth Circuit's factual determination concerning petitioner's privacy expectation was based upon its analysis of the undisputed, particular operational realities at petitioner's workplace and is therefore entirely consistent with *O'Connor*.

Given that the Ninth Circuit's factual determination is consistent with this Court's Fourth Amendment standard, it is inconceivable that the Ninth Circuit's factual determination could be in conflict with a decision of any other circuit court. Moreover, the three circuit court decisions cited by petitioner—each of which predated *O'Connor*—unlike the Ninth Circuit's ruling, did not turn upon whether the individual had a reasonable expectation of privacy in the place

searched.[8] Petitioner's cited cases are clearly inapposite.

In short, the Ninth Circuit's factual determination does not conflict with any decision of this Court or any other circuit court.

II

IT IS NEITHER APPROPRIATE NOR NECESSARY FOR THE COURT TO REVIEW THE NINTH CIRCUIT'S FACTUAL DETERMINATION

As explained above, with respect to respondents General Dynamics and Kessel, the instant petition amounts to a request that the Court review the Ninth Circuit's *de novo* factual determination that, based upon the operational realities of his workplace, petitioner did not have a reasonable expectation of privacy in his office or the credenza. However, this Court has repeatedly ruled that certiorari review is simply not appropriate for the purpose of reviewing lower courts' factual rulings. *E.g.*, *Texas v. Mead*, 465 U.S. 1041, 1043 (1984), *mem. denying cert. to* 645

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[8] In *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973), the Fourth Amendment issue was whether planting an electronic surveillance device in the individual's office constituted a trespass, and the court concluded it did not. In *United States v. Blok*, 188 F.2d 1019, 1019, 1021 (D.C. Cir. 1950), the court addressed whether, without a warrant, the police could search the individual's office specifically for evidence that the individual committed a crime, petty larceny. In *Williams v. Collins*, 728 F.2d 721, 728 (5th Cir. 1984), the court ruled that various federal actors were entitled to absolute immunity from tort liability for various actions, including searching the individual's office and desk, in which the court concluded, "[i]t is by no means certain [he] had a reasonable expectation of privacy . . . ."

S.W.2d 279 (1983) and 656 S.W.2d 494 (1983) (Stevens, J.) ("'We do not grant a certiorari to review evidence and discuss specific facts.'") (citation omitted); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (*per curiam*) ("[U]ltimate facts are subject to the 'clearly erroneous' rule, and their review would be of no importance save to the litigants themselves."); *N. L. R. B. v. Hendricks County, Etc.*, 454 U.S. 170, 176 n.8 (1981).

Indeed, the principle is so well settled that this Court has dismissed writs of certiorari where subsequent developments demonstrated the Court was essentially faced with deciding factual issues. *E.g.*, *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (where the litigants agreed on the resolution of the ultimate legal issue, leaving only the review of a factual determination, "[t]he appropriate disposition in such a situation is to dismiss the writ as improvidently granted."); *N. L. R. B. v. Hendricks County, Etc.*, 454 U.S. 170, 176 n.8 (1981) ("After briefing and argument . . . we are persuaded that our grant of certiorari on the cross-petition was improvident. The Court of Appeals held that the evidence in the record supported the Board's finding . . . . As such, we are presented primarily with a question of fact, which does not merit Court review.")

In accordance with the Court's prior decisions, respondents General Dynamics and Kessel submit it would be inappropriate for the Court to review the lower courts' factual determination that petitioner did not have an objectively reasonable expectation of privacy.

Additionally, in any event, the Ninth Circuit's *de novo* factual determination was clearly correct. As the

detailed facts set forth above (see "Factual Background" section) demonstrate, petitioner was fully aware of the extensive security practices and procedures at the Facility whereby "employees were being constantly searched and surveilled for compliance with security precautions in a manner that would be considered unduly invasive in a more conventional work place." *Schowengerdt*, 944 F.2d at 488.

In particular, petitioner was aware that, in his "peculiarly unprivate work environment," his office and its contents were subject to extensive searches, even in his absence. *Id.* Moreover, he was aware that General Dynamics security guards and investigators had access to keys to conduct such searches, and that security investigators, like respondent Kessel, had broad authority to investigate any possible compromise of security. *Id.* Petitioner also admitted that the Navy is particularly concerned that its employees might be blackmailed into divulging classified information as a result of a sexual liaison of the type solicited by the correspondence found in petitioner's credenza. *Id.* at n.5.

In light of the undisputed operational realities in place at petitioner's workplace, the inescapable conclusion is that reached by the Ninth Circuit:

> Given that peculiar environment, Schowengerdt did not have a reasonable expectation of privacy in his office or in his locked credenza, or in a manila envelope stored in the credenza which indicated on its exterior that it contained information that he wanted kept secret from his wife. He should have known that his credenza, even if locked, was subject to search, and that the in-

> scription on the manila envelope would serve only to trigger the curiosity of an investigator, or any fellow employee, trained to be alert to possibilities of blackmail. In short, Schowengerdt was "on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes."

Id. at 488-89 (citation omitted).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 91-1009

In the Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD NEAL SCHOWENGERDT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a civilian employee of the Navy who worked on classified weapons-related projects in a workspace that was subject to stringent and comprehensive security measures had a reasonable expectation of privacy in the contents of a credenza located in his office.

2. Whether the employee's constitutional rights were violated when the Naval Reserve discharged him pursuant to regulations that mandate the discharge of bisexuals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and rule:

Miscellaneous:

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A17, is reported at 944 F.2d 483. A prior opinion of the court of appeals, Pet. App. C1-C27, is reported at 823 F.2d 1328. The judgments, opinions, and orders of the district court, Pet. App. B1-B82, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1991. The petition for a writ of certiorari was filed on December 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner worked for the Navy as a civilian engineer on classified weapons-related projects. He also was a Chief Warrant Officer in the Naval Reserve, assigned to a missile test center. Pet. App. A4.

In his civilian job, petitioner worked at the Naval Industrial Ordnance Plant (NIOP) in Pomona, California. The NIOP, a 160-acre facility, is owned by the Navy and operated by General Dynamics Corporation. Pet. App. B6. Because the NIOP houses numerous top secret and secret military weapons projects, the Navy and General Dynamics employ extensive and stringent security measures. For example, chain link fences topped with barbed wire and interwoven with electronic sensing devices surround the NIOP. A steel cable is installed in the fence several feet above ground so that vehicles cannot penetrate it. Gates are secured by guard stations and hydraulic barriers that block vehicular passage until inspections have been conducted. Closed circuit cameras located throughout the NIOP are monitored by security officers 24 hours a day. *Ibid.*

To enter the NIOP, employees must display a picture badge that must be worn at all times on the upper left-hand side of the body. Guards are authorized to search all vehicles, including locked glove compartments, trunks, and closed containers. The Guard Force Policies and Procedures Manual *requires* guards to search every car leaving the NIOP after normal working hours. Pet. App. B9-B10.

To enter or exit a building at the NIOP, employees *must* open for inspection all packages, boxes, briefcases, purses, or other containers. Pet. App. E3. While in a building, employees and their belongings may be searched without their consent. *Id.* at B10. Secu-

rity guards have access to keys to all offices and office furniture, and they conduct frequent searches—both scheduled and random—of offices to ensure classified documents are properly stored. *Id.* at A5.

Not only are offices searched routinely by security guards, they are also searched routinely by the employees themselves. The Navy has a self-monitoring program whereby employees, assigned on a rotating basis, verify that offices, desks, and files of co-workers are properly secured. Petitioner participated in this self-monitoring program, and when it was his turn to check other employees' offices, "he pulled on desk drawers to see if they were locked and, if not, '[he] might be inclined to look inside and see if there were any documents lying loose, classified documents.'" Pet. App. B10.

Petitioner had a secret security clearance, and he was familiar with the Plant's security procedures, having worked there for 13 years. Pet. App. A5. He worked in Building 4, which housed the largest number of classified documents at the NIOP, including top secret documents. Building 4 also contained "strong room[s] and closed areas," where extremely sensitive military documents and hardware were stored. *Id.* at B8. Building 4 was therefore one of the most heavily secured buildings at the NIOP. *Ibid.*

Petitioner often had observed security agents searching his office to ensure compliance with procedures relating to the proper stowage of classified documents. Pet. App. B11. Additionally, he attended periodic security briefings where he was instructed that the government's concerns extended beyond the proper storage of classified documents and included, as well, concerns that employees not become involved in activities that might make them susceptible to blackmail. *Id.* at B15. Specifically, petitioner knew

that an applicant's sexual habits could influence the decision to grant a security clearance and, in obtaining his security clearances, petitioner had been questioned about his sexual habits. *Id.* at B8-B9. He had also received training on the security-related searches conducted at the NIOP and the duty of employees to submit to these searches. *Id.* at B13.

b. A security investigator for General Dynamics, Charles Kessel, received an anonymous tip that petitioner stored material in the lower left-hand drawer of his office credenza that would be "of interest to the security department." Pet. App. A5. After petitioner left work, Kessel entered petitioner's office, opened the lower left-hand drawer of petitioner's credenza and found a manila envelope that stated: "Strictly Personal and Private. In the event of my death, please destroy this material as I do not want my grieving widow to read it." *Id.* at A6.[1] The envelope contained correspondence and photographs indicating that petitioner was involved in extra-marital activities. *Ibid.*[2]

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[1] The parties dispute whether petitioner's office and credenza were locked. For purposes of this case, the court of appeals assumed that both were locked. Pet. App. A5-A6, B19.

[2] The correspondence in the envelope indicated that petitioner solicited sexual encounters through ads in "swingers" magazines and clubs. Petitioner wrote to women and men with whom he sought sexual relationships. He included in his letters his office telephone number, his Navy engineer business card, and reference to the fact that he worked for the Navy as a missile engineer. He also included nude photographs of himself in sexually suggestive positions, and photographs of himself in full Navy uniform. One of the letters received by petitioner was from an Italian flight attendant who sought sexual relationships primarily with military personnel. See Pet. App. A6 & n.2, B17-B18.

Security Investigator Kessel took the manila envelope and showed it to the Navy commanding officer at the NIOP. After examining the envelope's inscription and contents, the commander became concerned that petitioner could become a target of blackmail. Pet. App. B18. He expressed his concern to the Naval Investigative Service, which immediately sent Agent Carl Jensen to the Plant to provide assistance.

Based on his examination of the envelope, Agent Jensen concluded that petitioner fit the profile of someone who could be susceptible to blackmail or contact by hostile intelligence agents. Pet. App. B21. Agent Jensen determined that further investigation was warranted, and he conducted an immediate search of petitioner's office. During the search, Jensen seized four items that suggested petitioner may be a security risk: (1) a Japanese/English dictionary with notes and phrases that could be evidence of contact by a foreign agent; (2) a checkbook from a private business operated by petitioner that could be related to his sexual encounters and in which foreign agents might be identified; (3) gemstones in an envelope that could be used to pay potential blackmailers; and (4) several photographs of unidentified women. *Id.* at B20-B21. Jensen also interviewed petitioner, who admitted to being bisexual, but denied being a security risk. *Id.* at A4, B22.[3]

Following a comprehensive investigation, Agent Jensen concluded that petitioner had not been contacted by hostile agents and was not the target of

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[3] Petitioner stated that he kept the correspondence at his office because he wished to keep it secret from his family. He also wanted access to the correspondence during the day, he explained, because he composed letters regarding his sexual activities while at work. Pet. App. B16-B17.

blackmail. Jensen wrote a report of his investigation, which he sent to various federal offices responsible for maintaining security, including petitioner's commanding officer in the Naval Reserve. Pet. App. A7. Petitioner received an oral admonition from his supervisor at the NIOP for exercising poor judgment in storing the material in his office, but his security clearance and duties remained unchanged. *Ibid.*

The following year, petitioner resigned from the NIOP and took a job in the private sector with a military contractor. In the process of transferring petitioner's security clearance from government employment to private employment, the agency responsible for monitoring security clearances asked the Navy whether any evidence in petitioner's file could reflect adversely on his security status. The Navy provided Agent Jensen's report, which prompted a renewed inquiry into petitioner's background that contributed to a 13-month delay in his being granted a security clearance. Pet. App. A7.

In the meantime, when the Naval Reserve received Agent Jensen's report, it commenced administrative discharge proceedings pursuant to regulations mandating the discharge of bisexuals.[4] The proceedings were triggered by petitioner's admission to Agent Jensen that he was bisexual and his descriptions of his bisexual activities in the correspondence seized in

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[4] The regulations define "bisexual" as "a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts." Secretary of the Navy Instructions 1900.9D § 5.b (1981). The regulations mandate the separation of bisexual service members if "[t]he member has stated that he or she is a * * * bisexual unless there is a further finding that the member is not * * * bisexual." *Id.* § 7.b.2. See Pet. App. A14-A15 n.7.

his office. At the administrative hearing, petitioner denied admitting that he was bisexual, and he alleged that his description of his bisexual activities was fantasy-writing. The board found, however, that petitioner was bisexual and recommended that he be honorably discharged. Pet. App. A7-A8.

Petitioner was honorably discharged. Pet. App. A7, D5. He sought review before the Board for Correction of Naval Records, but the Board denied him relief. *Id.* at D5-D6.

2. As relevant here, petitioner filed a *Bivens* claim alleging that the government's agents violated his constitutional right to privacy when they searched his office. Pet. App. D1-D7. Additionally, petitioner alleged that his discharge from the Naval Reserve was unlawful, and he sought declaratory and injunctive relief compelling reinstatement. *Id.* at D5-D6.

The district court granted summary judgment to the government. Pet. App. B1-B82.[5] The court rejected petitioner's Fourth Amendment claim on two grounds: (1) that petitioner had no reasonable expectation of privacy in his office or its contents; and (2) that the searches were reasonable and work-related. *Id.* at B29-B34, B50-B51. The court also rejected petitioner's challenge to his discharge from the Naval Reserve. *Id.* at B69-B82.

3. The court of appeals affirmed. Pet. App. A1-A17. It first held that, given the pervasive and stringent security measures at the NIOP, petitioner had no

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[5] The district court initially dismissed all of petitioner's claims pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. A8. The Ninth Circuit in a prior opinion reversed and remanded the district court's Fourth Amendment ruling and remanded petitioner's claims involving his discharge from the Naval Reserve. *Id.* at C1-C5.

reasonable expectation of privacy in his office or its contents. The court observed that all employees were "well aware" of the "extremely tight" security procedures, *id.* at A11:

> Upon entering and leaving the building, and in the innermost recesses of their offices, employees were constantly being searched and surveilled for compliance with security precautions in a manner that would be considered unduly invasive in a more conventional work place.
>
> Whether locked or not, [petitioner's] office was searched daily, in his absence, by guards specifically looking for security violations.

Under these circumstances, the court concluded that petitioner had no reasonable expectation of privacy in his office, his locked credenza, or the manila envelope. "The inscription on the manila envelope would serve only to trigger the curiosity of an investigator, or any fellow employee, trained to be alert to possibilities of blackmail," the court added. *Id.* at A13.[6]

The Ninth Circuit also upheld the district court's rejection of petitioner's claims involving his discharge from the Naval Reserve. The First Amendment was not violated, the court held, because petitioner "was not discharged for writing about bisexuality but rather for *being* a bisexual, of which his purely private correspondence was evidence." Pet. App. A14. The procedural due process guarantee of the Fifth Amendment was not violated because petitioner was afforded "abundant opportunity to object to his discharge and to have his objections heard by an administrative board, before as well as after termina-

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[6] The court of appeals did not address the district court's alternative holding that the search was permissible as a reasonable, work-related search. Pet. App. A10 n.4.

tion." *Id.* at A15. Petitioner's substantive due process argument was held to be foreclosed by longstanding Supreme Court and Ninth Circuit precedent. *Ibid.* Finally, the court of appeals held that petitioner's discharge was not arbitrary and capricious because substantial evidence supported the Navy's conclusion that he was bisexual and therefore unsuitable for military service. *Id.* at A16.[7]

ARGUMENT

Both courts below found that, in light of the stringent and comprehensive security measures in effect at the NIOP, which included daily searches of his office, petitioner had no reasonable expectation of privacy in his office or its contents. The court below therefore held that no Fourth Amendment violation occurred when respondents searched petitioner's office. Those courts also held that the Naval Reserve lawfully discharged petitioner pursuant to regulations mandating the discharge of bisexuals. Those rulings are fully supported by the record, are consistent with this Court's precedents, and do not conflict with the decisions of any court of appeals. Further review is not warranted.

1. a. In *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987), a plurality of this Court held that "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." Further, the plurality held

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[7] In addition, the court held that petitioner's Ninth Amendment challenge to his discharge lacked merit, and noted that petitioner did not challenge his discharge on equal protection grounds. Pet. App. A15 & n.8.

that "some government offices may be so open to fellow employees * * * that no expectation of privacy is reasonable." *Id.* at 718. Following *O'Connor's* approach, the Ninth Circuit assessed petitioner's expectation of privacy "in the context of the employment relation" under the "actual office practices and procedures" at the NIOP, *id.* at 717, which included routine intrusive searches by security personnel and fellow employees. Pet. App. A3, B12. Based on "extensive uncontroverted evidence," the court of appeals found that petitioner worked in a "peculiarly unprivate work environment" that afforded him no reasonable expectation of privacy in his office or its contents. *Id.* at A11-A12.

Petitioner challenges that finding, but it is amply supported by the record, which is not in dispute. Employees at the NIOP were "constantly being searched and surveilled for compliance with security precautions," and these searches occurred "[u]pon entering and leaving the building, and in the innermost recesses of their offices," Pet. App. A11. Petitioner worked in "one of the most heavily secured buildings" at the Plant, *id.* at B8, and his office, "[w]hether locked or not * * * was searched daily, in his absence, by guards specifically looking for security violations." *Id.* at A11. Not only was petitioner's office searched daily by security guards, it also was routinely searched by petitioner's fellow employees pursuant to the Navy's self-monitoring security program. *Ibid.* Petitioner himself said that, when it was his turn to search other employees' offices, he felt obliged to open unlocked drawers to ensure documents were properly stored. *Ibid.* Petitioner knew, moreover, that security investigators had access to all keys and were authorized to search an employee's locked office and desk "when an indication

that a security compromise ha[d] been made or [was] being contemplated by an employee because of some reason which ha[d] come to [the investigator's] attention," *id.* at A13 n.6.

Moreover, petitioner acknowledged that the Navy had a compelling interest in protecting classified information and that this interest justified investigating situations where an "employee[] might be tempted to sell classified information, or might be either induced or blackmailed into divulging information as a result of romantic or sexual liaison." Pet. App. A12 n.5. Indeed, petitioner conceded that Security Investigator Kessel acted properly when he searched petitioner's credenza in response to a tip that it contained material regarding a potential security breach. *Id.* at A13 n.6. Petitioner also conceded that, in light of the inscription on the manila envelope, Kessel acted properly in examining the material in it. *Ibid.* Those concessions and the undisputed facts undermine any argument that petitioner had a reasonable expectation of privacy in his office or any of its contents.[8]

b. Petitioner also contends that Security Investigator Kessel violated the Fourth Amendment when he seized the manila envelope because he "should have

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[8] Petitioner contends that both courts below overlooked a material fact: namely, that *security guards* were not permitted to search personal materials "unless such material fell into the class of prohibited materials * * * such as guns, knives, explosives, etc., or were government or contractor equipment or materials," Pet. 12. Petitioner's office was searched by a security *investigator*, not a security *guard*, however, and it is undisputed, Pet. App. A13, that the investigatory power of the former exceeds that of the latter. Indeed, petitioner conceded that Security Investigator Kessel was empowered to search petitioner's credenza and the manila envelope. *Id.* at A13 & n.6.

recognized the intimately private nature of the material in the manila envelope and left it alone" or "discussed the subject with [petitioner] * * * rather than seizing the material," Pet. 15-16. But when a security investigator conducts a lawful search—as petitioner concedes Kessel was doing when he searched petitioner's office, Pet. App. A13 n.6—and discovers material that raises a reasonable suspicion that an employee may be a national security threat, the investigator is empowered to seize the material in furtherance of the investigation. A contrary conclusion would provide an employee with the opportunity to destroy incriminating evidence regarding the compromise of classified information.

Petitioner also argues that Kessel should have confronted petitioner with the envelope after seizing it, rather than showing it to his superiors. Pet. 16. This argument, however, is directed not to the legality of the seizure, but to the conduct of the investigation after the seizure. Security decisions of that nature are committed to the discretion of the Executive Branch. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988).

2. a. Petitioner also seeks review of the court of appeals' holding that the Navy permissibly discharged him from the Naval Reserve pursuant to regulations that mandate the discharge of bisexuals. Petitioner's principal argument is that the Navy's finding that he was bisexual lacked support by substantial evidence. Pet. 19. Because both lower courts have reviewed and sustained that factual finding, it does not merit this Court's attention. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 n. 5 (1985). In any event, the Navy's finding is amply supported by Agent Jensen's statement that petitioner admitted that he was bisexual. Pet. App. A16.

b. Finally, petitioner urges this Court to review the court of appeals' rejection of his constitutional challenges to the Navy's regulations mandating the discharge of service members who commit homosexual acts. Pet. 17. The Ninth Circuit's decision, however, is consistent with that of every other court of appeals that has considered this question. *E.g.*, *Ben-Shalom* v. *Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward* v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Beller* v. *Middendorf*, 632 F.2d 788 (9th Cir. 1980) (Kennedy, J.), cert. denied, 452 U.S. 905 (1981). See *Padula* v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987) (FBI agents). Cf. *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). This Court twice recently declined to review this question. Nothing has occurred since then that warrants different treatment of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

U.S. Constitutional Amendments

No. 91-1009

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REPLY BRIEF OF PETITIONER

I

INTRODUCTION

Petitioner received Private respondents' Brief in Opposition on 6 March 1992 and Government respondents' Brief in Opposition on 10 March 1992. Petitioner responds herein by exception as large portions of the briefs are restatements of the case and issues.

II

REPLY TO PRIVATE RESPONDENTS' BRIEF

The following ' page numbers and lines highlight petitioner's objections to statements made by private respondents.

1. Page 5, Lines 7-14 - Petitioner objects to the statement "the undisputed evidence demonstrated petitoner did not have a reasonable expectation of privacy.....by the federal respondents." There is no "undisputed evidence"; this is precisely the issue in contention. General Dynamics, as operator of the facility, was empowered by the government to enforce security regulations under standard provisions of the Defense Industrial Security Office (DISCO) and the existing contracts. As the petitioner has already extensively delineated, none of the government regulations in effect authorize seizure and confiscation.of personal materials, unless the items are on the list of prohibited materials. In fact, General Dynamics' own internal Guard Force Policies and Procedures Manual prohibits security personnel from tampering with employees' personal materials (See Appendix E of Petition). The DISCO Security Manual deals only with procedures and precautions for handling and safeguarding classified material. Respondents have consistently failed to produce any rule, regulation, statute, or other document which authorizes seizure and confiscation of personal materials unrelated to work under contract. Respondents assume that because security officials can search for evidence of security compromise that this automatically voids an employee's expectation of privacy for nonwork-related personal materials in the office and furniture. Such is not the case. Petitioner had over 27 years of experience in this highly regulated industry and is clearly aware of

what is job related and what is not. Therefore, petitioner insists that his Fourth Amendment rights to privacy of personal materials was violated.

2. Page 6, Lines 5-8 - Petitioner objects to the words "factual issue." It is not a "factual issue" which is in contention here but an issue of interpretation of the propriety of the act of seizure on the part of General Dynamics and Kessel; petitioner has asked the Court to review such propriety.

3. Page 6, Paragraph B.1, 3rd Sentence - Petitioner had no duties at the Pomona facility in his capacity as Chief Warrant Officer; his duties at the facility were solely related to his position as a GS-801-13 Test and Evaluation Engineer with the Aegis Program Office. As a Chief Warrant Officer petitioner was responsible only to his Naval Reserve Unit at the Naval Air Station in Point Mugu. Therefore, any letters, documentation, or other information related to his Naval Reserve position should not have been within the jurisdiction or scope of interest of General Dynamics or Navy officials at the Pomona facility; therefore, such material should not have been considered as related in any way to his civilian position at that facility.

4. Page 7, Lines 4-24 - Employees at the Pomona facility were not "constantly searched" in 1982 and such procedures were not any more "unduly invasive" than many commercial firms whose guards regularly examine offices, factories, and employees' briefcases upon departure from their facilities. Respondents are attempting to paint a picture of the Pomona facility which did not actually exist. Offices were examined, not searched, for the presence of unsecured classified documents, or possibly stolen contractor/government equipment. Only on periodic occasions, approximately once every six months, classified

safes were opened and inventoried to determine whether or not only classified material was properly stored in such containers. Upon leaving the plant, employees were required to open brief cases and other unsealed parcels to ensure that no classified documents or contractor/government property was present. Respondents' arguments reveal that they are not really cognizant of DISCO security procedures; if classified material is properly wrapped and addressed, it can be carried out ready to mail in which case they are never opened. Also, personal materials were not examined nor were they commented upon as stated in the aforementioned Guard Force Polices And Procedures Manual. On rare occasions (once every six months or so) drivers were required to open their vehicle trunks for inspection. The purpose here was usually to examine for the presence of contractor or government property.

5. Page 7, Last Paragraph, Page 8, First Paragraph - Here again, respondents are implying that because petitioner was aware of possible compromising romantic situations, that he ignored such precautions...such is not the case. In his private affairs, petitioner never compromised security in any way. Any indication that anyone was actually interested in details of his job would have resulted in an immediate report.

6. Page 9, Second Paragraph - In stating that petitioner was aware of the responsibilities of General Dynamics' security investigators, respondents are attempting to broaden the scope of their responsibilities beyond what actually existed in 1982. General Dynamics' investigators were not Department of Defense intelligence agents and were not empowered with any investigative authority outside of protection of contractor/government property or classified information.

7. Page 9, Paragraph 3, to Page 11, Line 2 - Petitioner strenuously objects to the title of this paragraph as well as this entire section. Respondents reacted to an anonymous phone call that "...material of interest to the security department" was present in petitioner's office; yet there was no tangible information prior to or after the search that indicated any kind of compromise. Furthermore, respondents found only private letters and other memorabilia belonging to petitioner. Since no indication of any kind of compromise was found nor did any actually exist, the search should have ended there. Petitioner has explained in his Petition why he had the inscription "Strictly Personal and Private...etc.." on the envelope. Aside from respondents' hasty erroneous conclusions immediately following the search, respondents are patently incorrect in stating on Page 10, Lines 21-33, and Page 11, Lines 1-2, that such correspondence suggested "...petitioner may have compromised security on numerous occasions." Is it wrong to reveal your generic occupation or give an acquaintance your telephone number? Does General Dynamics require such secrecy of all of their employees? Even if they do, General Dynamics has no jurisdiction over the private lives of Federal employees. Respondents' implication that the "Italian Stewardess" was a foreign agent or seeking classified information is ludicrous. Firstly, the stewardess in question was of Italian descent and not a foreign national; secondly, she had no interest whatsoever in petitioner's occupation; thirdly, petitioner never actually met her. How far can this be from a compromise of security?

8. Page 11, Paragraph 4 - While petitioner finally but reluctantly agreed that the search might have been justified as a precautionary measure, petitioner never agreed that seizure and confiscation of his personal materials was warranted. As an example, a hypothetical

situation where such an act might have been warranted would have been if it had been discovered that an employee had been consorting with a foreign national who had more than a casual interest in his work and where the employee might have been placed in a compromising position, i.e. one in which a blackmail situation could occur. In security terms such a conjunction is termed a nexus. In the instant case, it was determined that there was no such nexus. Petitioner contends that respondent Kessel acted wrongly in seizing the manila envelope and turning it over to Naval authorities. He could have easily contacted petitioner and discussed the situation if he really believed that there was a potential for blackmail or compromise of security. Petitioner must again remind the Court, however, that documentation in the record, especially the Naval Investigative (NIS) Report, an excerpt of which was filed with the Petition as Appendix F, stated that the initial cause for the investigation was for the possession of pornography. Petitioner notes that respondents object to the inclusion of Appendix F on the alleged grounds that it was not in the district court record. Petitioner is uncertain at this point which portions of the NIS report were filed with the district court record; however, this report formed the basis upon which petitioner was discharged from the Naval Reserve and petitioner is certain that the enire report is in the Navy Review Board records. The NIS investigation has been a central issue throughout this long and complex case; had it not been for this investigation, petitioner's complaint may never have been filed. The NIS report has nearly a dozen pages but no where in the report is the word blackmail mentioned nor is it even alluded to. The entire thrust of the investigation was oriented toward possible illegal activities of petitioner and concluded in his final exoneration.

9. Page 11, Paragraph 5 - While petitioner concedes that very specific romantic or sexual liaisons could result in creating a potential for blackmail, surely the Navy does not insist that their employees practice continence or refrain from romantic activities. Any romantic or sexual activity that may have the potential for blackmail has to be evaluated in light of the aforementioned nexus which has to exist before it is elevated to the status of a security concern. This is precisely the issue and question before the Court with respect to the private respondents: did Kessel act correctly in prejudging the material inside the manila envelope as constituting the basis for potential security compromise? Petitioner submits that his judgment was premature and precipitated a chain of events which caused irreparable harm to petitioner. As was proven later, there was no security nexus between petitioner's activities and his position or work at the Pomona facility. Petitioner maintained his security clearance and obtained two new clearances after the events of 1982. However, the actions of the private respondents in seizing the manila envelope and turning it over to Naval authorities resulted in his unjustified discharge from the Naval Reserve and unwarranted delays in granting security clearances with two employers (Northrop Corporation in 1984 and the Defense Logistics Agency in 1990). While respondents may investigate all they want to, such a seizure of personal materials should be done only after a determination has been made that a security compromise exists. Otherwise, employees could be deprived of their constitutional guarantees of privacy solely on the basis of an arbitrary and capricious assumption.

10. Pages 12-14 - Petitioner disagrees with the entire argument presented in this summary; again, there is no "undisputed evidence" nor

is there any evidence at all concerning whether or not peitioner should have a reasonable expectation of privacy. Nor was there any "factual determination" made by the lower courts; there were only judgments that petitioner could not have a reasonable expectation of privacy because of the "operational realities." Petitioner submits that these so-called "operational realities" are a fiction; security at the General Dynamics facility was less than that which existed at Flour Corporation in Irvine, for example, in 1982. Petitioner visited the Flour facility around that time period and found that the level of security there was at a level of at least twice that at the Pomona facility, yet there is no classified information on contract. Yet I would expect that employees at Flour would have enjoyed privacy of personal materials in their desks. Defense contractors by no means have a monopoly over highly regulated security procedures. Multinational corporations, industrial, commercial, or financial frequently have security concerns which are equal to that of a defense contractor. Yet the "operational reality" of any facility should not in any way infringe upon an employees right to privacy of personal materials in his desk or on his person; an employer does not have to take your wallet, for example, which you may leave in your desk and rummage through it; nor does he have to rummage through a file in your desk that pertains to a course you are taking at the local community college. Personal materials can easily be distinguished from work-related materials. If employers seek to decree that a personal material is work-related, they must be constrained by the courts to make this judgment at their peril.

11. Pages 14-17 - Petitioner disagrees with respondents' entire circuituous reasoning in this section. Petitioner has personally studied and argued in pro per all of the major cases pertaining to

privacy in the workplace for nearly a decade and believes that he has a reasonably good understanding of these cases. Petitioner submits that the majority of case opinion regarding privacy in the work place supports his position that a search and seizure must be work-related. While it is conceded that under the terms of the General Dynamics Security Agreement with the Navy that intensive searches were the rule of the day, these searches were for the specific purpose of securing classified documents and government/contractor property and not to pry into personal affairs of employees. Respondents seek to broaden the scope of their responsibility to include searches related to off-duty activities of government employees. Kessel was not a Department of Defense investigator and was not empowered to look into such matters, particularly with regard to petitioner, who was not a General Dynamics employee. Whether or not Kessel may have been justified in invading the privacy of one of their own employees is uncertain, at least in the mind of petitioner. It would appear that even in such a case, there would have to be convincing evidence that security had been compromised before a seizure of personal property should be exercised. In any case, the material seized would have to be work-related.

12. Pages 17-20 - Petitioner disagrees with this entire argument; again, he has not asked the Court to review a "factual determination" but rather to review judgments based upon no facts in evidence. There is no evidence whatsoever that the material seized by respondents revealed that a security compromise had actually taken place nor even could have reasonably taken place under the circumstances. Petitioner has asked the Court to review whether or not the so-called "operational realities" of the workplace at the Pomona facility in 1982 negated his reasonable expectation of privacy; this is not a factual determination.

While there are factual issues still in dispute which were mentioned in the Petition as well as herein, the petitioner has requested that the Court specifically review the judgments and not "factual determinations." It appears that respondents seek to impose a contractual agreement upon petitioner which did not in fact actually exist, i.e. that personal materials were subject to search and seizure regardless of their work-relatedness, a position which could lead to employee lawsuits based on contractual theory. Accordingly, respondents' case citations are meritless as the petitioner does not seek review of facts beyond those which come within the scope of the "clearly erroneous rule." If, however, the record does not support so-called "factual determinations," perhaps these determinations should be reviewed. Respondents suggest that the manila envelope contained information that might have led someone to believe that a security compromise could have taken place if other factors had been present. Anyone with training in probability theory will readily concur with petitioners position that the net probability (P) of an event actually occuring decreases geometrically as multiplier subprobabilities increase [P = (might)(could)(if)]. It does not take a mathematician to understand that such an important decision as whether or not a security compromise has been made should not turn upon what could happen if several unlikely events cojoin. Respondents have only alluded to a "possible" compromise of security with regard to the materials in the manila envelope; anything is "possible;" does this give an employer the right to seize personal materials on the outside chance that it "might" involve a security compromise? The comfortable security "blanket" is often used to provide warmth when there is no real evidence of work-relatedness.

II

REPLY TO GOVERNMENT RESPONDENTS' BRIEF

1. Page 3, Lines 1-3 - The word "must" should be deleted. Sealed packages ready for mailing were never opened for inspection during the thirteen years that petitioner was employed at the Pomona facility. Petitioner personally carried sealed packages, both work-related and personal, which were wrapped for mailing through the Building 4 Lobby and dropped them into the mailbox outside the building on countless occasions; guards would glance at the packages and when it was observed that they were wrapped for mailing, they were not opened. Call this a "hole" or whatever in the security blanket, but this is a fact.

2. Page 5, Footnote 2 - Petitioner again objects to the insinuation that there was something wrong with including photographs of himself, his name, and telephone number in correspondence with potential acquaintances. Whether or not petitioner was photographed nude is irrelevant; respondents seek to place a moral judgment upon a natural state of man. Secondly, petitioner again objects to the insinuation that the "Italian flight attendant" was a foreign national; this is pure assumption, and, as stated previously, the attendant was not a foreign national.

3. Page 5, Paragraph 2 - Kessel's initial reaction was that of moral indignation as he personally stated to petitioner that "one of our employees would have been immediately fired for having that kind of material on the premises" or words to that effect shortly after the seizure. As previously stated, the Naval Investigative Report, which both public and private respondents are eager to suppress, does not even once mention the word blackmail in all of its eleven pages. Early court

records will show that the defense in the 1983-87 era was that petitioner possessed pornographic material which could have been "embarrassing to the government." Respondents attempted to implicate petitioner in something illegal but when the U.S. Attorney and Postal authorities declined to prosecute, the matter was dropped. This early era defense relied upon the hope that petitioner could not, under any circumstances, enjoy any privacy in the workplace. After the 1987 Appellate ruling to the contrary, respondents adopted the comfortable security blanket defense (which usually requires little or no justification or connection with reality) and the blackmail hypothesis.

4. Page 5, Paragraph 3 - Petitioner contends that Agent Jensen was immature, overly zealous, and not thorough at all in his investigation. Had he been thorough, he would have first looked at petitioner's personnel file where he would have immediately discovered that petitioner was married to a Japanese woman and that he was an advanced student of Japanese; he also would have discovered that petitioner had filed a notice with his employer relative to Questant Enterprises, a career counseling firm. Furthermore, had he conversed with friends and associates of petitioner, he would have discovered that petitioner had already had a few extramarital affairs and that his wife knew of some of these affairs. However, Agent Jensen made no preliminary inquiries; instead, he made the immature assumption that because petitioner had a Japanese/English dictionary that he might have contacted a foreign agent, presumably Japanese (our allies). He also made the immature assumptions that the possession of a checkbook and gems could have some remote connection with blackmail attempts. Agent Jensen was overzealous when he seized all of these personal materials and even went so far as taking framed photographs of petitioner's wife and daughter, thinking

they might be "illicit" associates. How blatantly invasive of privacy and how far away from reality can a "trained" investigator be? Witnessing this raid on his office and personal effects was the most traumatic event experienced by petitioner in his entire lifetime.

5. Page 5, Footnote 3 - Petitioner objects to the assumption that because he wanted to keep something "secret" from his family, that this automatically makes him susceptible to blackmail. Every situation has to evaluated in the proper context. Petititoner also objects to the insinuation that he composed personal letters while on duty. Petitioner frequently carried the Manila envelope through the gate and to the Pomona Public Library and/or Pomona Post Office where he composed or mailed letters. Petitioner usually carried the envelope in his vehicle on such occasions and it was never examined.

6. Page 7, Footnote 4 - While Petitioner has denied that he is actually bisexual, he nevertheless challenges the constitutionality of the Navy's regulations on the grounds that they are inconsistent with that of other services, such as the Army. The traditional Navy position that being out at sea for extended periods would expose heterosexuals to the mercy of homosexual/bisexuals is quite archaic. Firstly, men and women serve side-by-side on Navy vessels today; secondly, voyages are of much shorter duration today than in the 18th century; and thirdly, because of the sexual preference population distribution today, there is no more such exposure aboard ship than there would be on the shore.

7. Page 12 - Petitioner concedes that Kessel may have acted properly in responding to the anonymous tip and examining the material in the manila envelope in pursuance of his official duties; however, petitioner contends that Kessel invaded his privacy when he seized the material and turned it over to outside authorities. A private matter can still

remain such when confined to only one other person, particularly if such person really believed that he had acted within the scope of his official duties and did not divulge the information to others. But when the matter is exposed to various other individuals and agencies, it is no longer private and, as in this case, resulted in dire consequences. Both private and public respondents overemphasize the "invasive" nature of the Pomona facility. Any employer, public or private, usually has keys to their employees' desks and may, from time to time, be required to enter such desks in their employees' absence when looking for a needed document or other work-related materials. Because such a condition exists should not void the reasonable expectation of privacy on the part of such employees with respect to personal materials such as letters, notebooks, dictionaries, etc. left in the desks which are of no concern to the employer. It seems conclusive to petitioner that it is totally unreasonable for respondents to assume that petitioner may be a national security threat because of extramarital affairs. Would respondents advocate that marital fidelity become a condition of receiving a security clearance or that such employees be subjected to intense investigations to determine their loyalty to the United States of America?

8. Page 13, Paragraph 2.a. - Petitioner objects to the phrase "factual finding" with respect to the alleged bisexuality of petitioner. Because respondents make a declaration that something is a "factual finding" and convince the lower courts to rule accordingly does not make it a fact. Respondents have consistently misquoted petitioner in stating that he admitted that he was bisexual; petitioner only admitted that in his correspondence he had stated that he was bisexual but denied being actually bisexual. Petitioner submits that such a ruling of "factual

finding" does not fit the definition of evidence in the Federal rules.

9. Page 13, Paragraph 2.b. - Again, respondents place petitioner in the class of those service members discharged for admission or commission of homosexual acts when the record clearly shows that petitioner merely indicated an interest in bisexuality to correspondents during a limited period in the early 1980s and never actually committed any such acts. Petitioner's sexual orientation toward females is well-known among friends, associates, and his immediate family. While petitioner believes that military rules against homosexuality are unconstitutional, irrelevant, archaic, and will eventually be abandoned, he has not sought equal protection on these grounds because he is not a homosexual. An examination of cases cited will quickly reveal that petitioner's situation is quite different from those cited. Prior to Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) there was a close analogy between Ben-Shalom and the petitioner's case as cited in the Petition at Page 17 under Ben-Shalom v. Secretary of the Army 489 F Supp 964 (1980 E.1 Wis) where it was disclosed that there was no evidence of homosexual acts with, or advances to, other reserve personnel. However, in the instant case petitioner has denied any bisexuality or homosexuality and, as stated herein, his orientation is that of a heterosexual as all of his affairs have been with women. Furthermore, in Ben-Shalom v. Marsh supra, Ben-Shalom evidently increased her propensity toward the same sex and insisted upon continuance of this orientation while still in the military and when seeking to re-enlist. Respondents cite Woodward v. United States, 871 F.2d 1068 (Fed.Cir.1989), wherein a Naval officer and admitted homosexual, went one step further and insisted on continuance of his lifestyle and even went so far as to write a letter to the Chief of Naval Personnel stating

in part:

> ...I am, and have been, since I became sexually aware, primarily homosexually oriented...I do, and will continue to associate with other homosexuals...I respectfully request the chance to contribute to the defense of the United States and am an honest, open "gay" officer.

While such honesty is commendable, the world and particularly the military is unfortunately not ready for this degree of candor. When petitioner was in the military, he respected the laws then in force and never insisted on a lifestyle in conflict with these laws. Likewise, the other cases cited by respondents, i.e. Rich v. Secretary of the Army, 735 F.2d 1220, Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987), and Bowers v. Hardwick, 478 U.S. 186 (1986) involve admitted homosexuals who insist on their lifestyle in opposition to existing law. There is no analogy in the instant case. Petitioner received above average evaluations as a Naval Reservist as can be seen by examining his personnel record but he was not clearly cognizant that bisexual activity was prohibited. He only engaged for a brief time in a fantasy writing exercise wherein he expressed an interest in bisexual activity with couples and not with single males. However, as can be seen by the writings, the majority of his letters were addressed to females and his orientation was definitely heterosexual. When it seemed apparent that many of the correspondents were con artists who only wanted to sell photographs or membership in a club which did not result in any actual contacts, petitioner discontinued the exercise. He then decided to gather statistical information relative to the number of correspondence exchanges and write an expose on the "swinging" circle and the con artists operating under its umbrella; however, the raid on his office and personal effects was so traumatic and damaging to his creative psyche that he never recovered sufficiently to pursue this effort.

IV

SUMMARY AND CONCLUSION

In seizing petitioner's personal materials and exposing his private affairs to others, private respondents exceeded their responsibility as security custodians under contract with the government and violated petitioner's fourth and fifth amendment rights. The "operational realities" of the workplace were not so restrictive that petitioner should have been deprived of a reasonable expectation of privacy for personal materials in his office. In seizing other personal items unrelated to his work, government respondents violated petitioner's first, fourth, and fifth amendment rights. Investigator Kessel made hasty and unfounded judgments relative to the significance of petitioner's personal materials. Agent Jensen was overly zealous, immature in judgments, and performed no investigation prior to the seizure. Neither private nor government respondents should be granted immunity for such actions which have caused irreparable harm to petitioner's military and civilian career. The Navy also erred in discharging petitioner for merely engaging in a correspondence exercise when there was no evidence of actual bisexual acts. Petitioner has asked the Court to review issues and judgments and not factual determinations. A Supreme Court review and decision in this case could have very important legal implications for employees and employers alike in all sectors of society and could set a landmark precedent for privacy in the workplace. Petitioner respectfully urges that the Court issue a writ of certiorari to review the lower court's judgment and opinion in this matter.

Dated: 13 March 1992

Richard N. Schowengerdt
In Propria Persona

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1991

NO. 91-1009

RICHARD N. SCHOWENGERDT, PETITIONER

v.

U.S.A. ET. AL.

PROOF OF SERVICE

I, Richard Neal Schowengerdt, do swear or declare that on this date, 13 March 1992, pursuant to Supreme Court Rules 9, 12.1, 29.3, and 29.4, I have served the attached REPLY BRIEF OF PETITIONER on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and witn first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530
Attn: Anthony J. Steinmeyer
E. Roy Hawkens

Gibson, Dunn & Crutcher
2029 Century Park East, Ste. 4000
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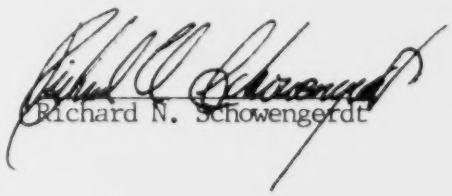
Richard N. Schowengerdt

STATE California
COUNTY OF Los Angeles

SUBSCRIBED AND SWORN (OR AFFIRMED) TO
BEFORE ME THIS 13th DAY OF MARCH 1992.

Evangelene Francis
EVANGELENE FRANCIS